

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-030**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Neil Margolis
Ms Jean Moor

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

HEARING DATE: October 27, 2011

ISSUE(S): Entitlement to Personal Care Assistance benefits for snow
removal

RELEVANT SECTIONS: Sections 131 of The Manitoba Public Insurance Corporation
Act ('MPIC Act') and Section 2(3)(a), Schedules C and D 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] was involved in a motor vehicle accident on July 28, 2010 when his vehicle was rear ended as he was stopped on the highway waiting to make a left turn. As a result of the accident the Appellant sustained a soft tissue injury to his neck.

The Appellant sent an email to MPIC's case manager asking them to assist with the cost of snow removal. The case manager arranged for a Personal Care Assistance ("PCA") assessment to determine whether he was entitled to PCA benefits. [Appellant's Occupational Therapist]

completed a PCA assessment tool on November 18, 2010. Based on the results of this assessment, the Appellant scored 3 points for yard work. The case manager issued a decision on December 17, 2010 advising the Appellant that in order to qualify for entitlement to PCA expenses, a minimum score of “9” is required. Since the Appellant’s assessment score was “3”, this resulted in no entitlement to PCA and the case manager informed the Appellant he did not qualify for PCA expenses.

The Appellant made an Application for Review of the case manager’s decision on February 9, 2011. In this Application for Review the Appellant stated:

“I am not satisfied with this decision as my original question was not answered! It was simple, “where do I send the bill for snow removal”. What I received was an in home assessment for PCA in which snow removal was lumped into yard care. Anyone who lives in Manitoba and more precisely rural Manitoba knows that snow removal is NOT yard care, it is an essential service that can be the determining factor between life and death if ambulance or fire fighting vehicles have restricted access.

I have snow removal equipment and have been self sufficient in this task for over twenty years, however, since the high speed rear end collision, my physical abilities are quite restricted and I am unable to handle that equipment. This winter I have had to pay for snow removal, since this is an out of the ordinary expense for me and this expense is directly related to my physical ability as a result of the collision I expect MPI to cover this cost. SO, my question remains where do I send the bill for snow removal, and once again let me emphasize that I am not looking for a daily/monthly stipend as per PCA.

Please find attached an aerial photo of the area requiring snow removal. The driveway is approximately 700 ft long and abuts [text deleted].”

Attached as Appendix “A” is a photo of the Appellant’s property showing the length of the driveway.

On March 1, 2011, the Internal Review Officer confirmed the case manager’s decision and dismissed the Appellant’s Application for Review. The Internal Review Officer determined that there was no entitlement to PCA benefits unless the Appellant attained a minimum assessment

score of “9” points. Since the Appellant had scored only “3” points on the PCA tool, he did not qualify for PCA benefits for snow clearing. The Internal Review Officer stated:

“In your Application, you indicated that snow removal is not yard care but rather an essential service in order to keep your driveway clear in the event an ambulance or firefighting vehicles were dispatched due to an emergency. You also submitted an aerial photograph of your property and stated your driveway from your home to the approach at [text deleted] is approximately 700 feet in length.

I do not disagree with your rationale that keeping your home accessible in the event of an emergency is a completely reasonable approach to take. However, PIPP is not an all encompassing plan. Legislation is clear in that you require a minimum score of 9 points in order to qualify for PCA benefits. Further, legislation is also clear that expenses for snow removal falls under “yard work” within the PCA Assessment Tool. To put it simply, if you are not entitled to PCA benefits, you are not entitled to be reimbursed for the cost of snow removal. Neither the claim staff nor the Internal Review Office has the discretion to amend legislation.

Accordingly, I am upholding the case manager’s decision and dismissing your Application for Review.” (underlining added)

Appeal:

The Appellant filed a Notice of Appeal on March 7, 2011. In an attachment to this notice the Appellant stated:

“I wish to once again appeal the decision from MPI not to pay my out of pocket expenses for snow removal. Seems my request doesn’t fit into the cookie cutter mould (sic) for PIPP. Quite frankly I don’t care what the legislation that MPI is hiding behind states, the fact remains that as a direct result of a high speed rear end collision I am unable to do this task and therefore I am looking to collect my out of pocket expenses. I should note that in the first appeal [case manager] has down played my injuries as a soft tissue injury to my neck. Please find enclosed a copy of my MRI as well as copy of the original appeal. Note, as a result of this “highway speed” rear end collision I have sustained 17 herniated discs in my back.”

Relevant Provisions:

The relevant provisions of the MPIC Act in respect of this appeal are:

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 relevant provisions of Manitoba Regulation 40/94 are:

Reimbursement for personal care assistance under Schedules C and D

2(3) Subject to the maximum amount set under section 131 of the Act, the corporation shall reimburse a victim for the actual and proven expenses of personal care assistance in accordance with Schedules C and D if

(a) the personal care assistance meets the minimum score prescribed in Schedule D;

Schedule D - Functional Report

Instructions for Using the Developmental Scale

Section 1 – Personal Care Activities

7. Yard Work includes outdoor home maintenance activities such as raking leaves, mowing lawn, snow removal, wood chopping (only if wood is the main source of heat) and cleaning eavestroughs. This is only to reflect essential needs and not activities of an aesthetic nature. Examples of activities that are not included are painting and pool maintenance.

Schedule D – Personal Care Assistance Scoring Template

Criteria for Scoring Personal Care Activities

Section 1

7. Yard Work includes outdoor home maintenance activities such as raking leaves, mowing lawn, snow removal, wood chopping (only if wood is the main source of heat) and cleaning eavestroughs. This is only to reflect essential needs and not activities of an aesthetic nature. Examples of activities that are not included are painting and pool maintenance.

The Commission was provided with [Appellant's Doctor #1's] Clinical Notes from July 29, 2010 to March 24, 2011 and his medical report of March 24, 2011. Also provided were [Appellant's Doctor #2's] MRI for Cervical Spine, Thoracic Spine and Lumbar Spine dated February 18, 2011, and [Appellant's Sports Medicine Specialist's] medical report of May 19, 2011.

[Appellant's Doctor #1], in his report to MPIC of March 24, 2011, advised that he had reviewed the Appellant's MRI report and he noted that the report documented the possibility of a disc protrusion touching the L3 to L5 nerve roots bilaterally. [Appellant's Doctor #1] stated that in

his opinion there is an ongoing condition and that this would directly relate to the Appellant's July 28, 2010 motor vehicle accident. He further stated:

“He was able to work prior to the motor vehicle accident but subsequent to this has ongoing significant and disabling pain...”

It is my current opinion that as far as functional restrictions are concerned he would not be a candidate for a formal work hardening...”

[Appellant's Sports Medicine Specialist], [text deleted], provided a report on May 19, 2011 and stated:

“I initially saw [the Appellant] in consultation for his thoracic spine on November 23, 2010. He was referred to the [text deleted] Clinic by [Appellant's Doctor #1]. On that day, I found that he had reduced thoracic rotation on the left by 20° and reduced cervical range of motion worse on the left side. His side rotation was decreased by about 30-40°. He had full range of motion of his shoulders and 5 out of 5 power. He was tender on the left side over the paraspinal musculature, proximal traps, the levator scapulae and paraspinal musculature to the T3 to T5 region, the rhomboids and the T8 to T11 region. At that visit, he was diagnosed with left thoracic hypomobility with paraspinal muscle pain and possible myofascial pain syndrome. I recommended that he consider taking ibuprofen 400 mg three times a day for 3-4 weeks and start seeing a manual physiotherapist, and consider dry muscle needling. At that time, he did not have any MRI results available.

[Appellant's Sports Medicine Specialist] further stated:

“On examination, he still had some limitation in side rotation of the cervical spine on the left side, decreased 25° bilaterally and extension to the left was about 10° and stiff. He was tender to palpation paraspinal at the T1/T2 level on the left side. His upper extremity neural exam was normal. His thoracic spine rotation was still decreased to the left by about 15° versus the right but his range of motion was pain-free. He had full range of motion of both of his hips and 5 out of 5 lower extremity muscle power.

MRI reports that had been sent reported this patient had MRI's on his cervical spine, thoracic spine and lumbar spine. As you know, these reports show degenerative change with bilateral neural foraminal narrowing at C4/5 and C5/6 and C6/7 levels in the cervical spine, disc protrusions in the multiple levels of the thoracic spine, and disc protrusions that may be touching the L3 to L5 nerve roots at the L2/3, L3/4, and L4/5 levels.

It is certainly possible that these MRI findings could be responsible for this patient's left thigh symptoms. I cannot conclusively state that all of these MRI findings are from his motor vehicle accident as it is certainly possible to have these findings without trauma. The fact that he has them throughout his entire length of his spine certainly supports a traumatic origin or an exacerbation of existing disc protrusions. Certainly, his paraspinal

muscle pain is consistent with a post motor vehicle accident myofascial pain syndrome.”
(underlining added)

After review of the Appellant’s medical report and his testimony, the Commission finds that the Appellant suffered significant injuries which have an ongoing adverse effect with the quality of his life.

Appeal Hearing:

The Appellant testified at the hearing and informed the Commission that prior to the motor vehicle accident he had been operating his own [text deleted] business for many years, but since the motor vehicle accident he was unable to continue this employment. His son is now operating the business.

The Appellant testified that:

1. Prior to the motor vehicle accident he was able to use his snow removal equipment and was self-sufficient in carrying out this task for 20 years.
2. He was unable to handle this equipment after the motor vehicle accident.
3. His driveway is approximately 700 feet long and abuts [text deleted].
4. During the 2010-2011 winter season he had to pay for snow removal and this expense is directly related to his inability to carry out this task as a result of the injuries he sustained in the motor vehicle accident which was no fault of his own.
5. The removal of snow from his residential roadway is essential in permitting him to enter and exit from his residence.
6. Yard work is fundamentally different from snow removal.
7. Yard work is not an essential service.

8. Snow removal is an essential service in order to keep the driveway clear in the event ambulance or firefighting vehicles are sent to his property due to an emergency.

In response, MPIC's legal counsel submitted that snow removal was included in yard work and clearly falls within Section 131 of the MPIC Act. Since the Appellant did not score the requisite "9" points in order to qualify for PCA, the expenses for snow removal were not covered under Section 131 of the MPIC Act.

Discussion:

The Commission issued a decision on March 6, 2000 in *[text deleted]* (File No. AC-99-119). The issues on appeal were home care assistance and whether yard work was included under Section 131 of the MPIC Act. In this appeal the Appellant was involved in a serious motor vehicle accident and during the period of his disability MPIC reimbursed the Appellant for the cost of clearing snow from the pathways at his residence. However, MPIC refused payment for yard work expenses such as grass cutting and the cost of maintaining the exterior of his home.

On appeal, the Commission rejected the Appellant's request for reimbursement of yard work because it was governed by the Regulation under Section 131 of the MPIC Act. The Commission notes that at the time of the motor vehicle accident:

1. Yard work did not include snow removal.
2. Snow removal was excluded from the Regulation under Section 131.
3. MPIC reimbursed the Appellant for the cost of snow removal.

In respect of the snow removal for which MPIC reimbursed the Appellant, the Commission stated:

“Patently, the removal of snow from residential pathways is essential to enable the victim to enter or exit from his or her residence. In [text deleted] case, this became the more important since both [Appellant’s wife] and their young daughter were also injured in the accident.

It follows from the foregoing that lawn and garden care, no matter how high the grass or the weeds, do not fall within the kinds of home care assistance for which [text deleted] qualified. We have no evidence that would bring the maintenance of the exterior of his home within the intent of Section 138. This facet of his appeal must, therefore, fail.”
(underlining added)

Subsequent to the decision in [text deleted] the MPIC Act was amended to include snow removal within the definition of yard work under the Regulation governed by Section 131 of the MPIC Act. As a result, snow removal comes within the definition of yard work and is included within the PCA tool enacted pursuant to Section 131 of the MPIC Act.

The Commission agrees with the Appellant that snow removal is not yard work but is an essential service which would permit him to have access and egress to his property and to ensure in the case of an emergency that an ambulance or firefighting vehicles could have access to his property. The Appellant’s driveway is approximately 700 feet long and he is unable to use the snow removal equipment due to the injuries sustained in the motor vehicle accident. However he is required to pay for snow removal costs since he is not being reimbursed by MPIC in respect of these costs.

Decision:

The Commission was impressed with the Appellant’s submission and found him to be a candid and straightforward individual. Unfortunately, the Commission cannot find in favour of the Appellant being reimbursed for snow clearing expenses because as a result of an amendment to the MPIC Act, snow removal is contained within the definition of yard work and is included in the PCA tool enacted pursuant to Section 131 of the MPIC Act. As a result, the Commission

reluctantly finds that the Appellant does not qualify for reimbursement of snow clearing expenses pursuant to Section 131 of the MPIC Act. Accordingly, the Appellant's appeal is dismissed and the Internal Review Officer's Decision dated March 1, 2011 is confirmed.

Dated at Winnipeg this 24th day of November, 2011.

MEL MYERS, Q.C.

NEIL MARGOLIS

JEAN MOOR