

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-13-070**

PANEL: Ms Jacqueline Freedman, Chair
Mr. Brian Hunt
Ms Sandra Oakley

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

HEARING DATES: June 28, 2017 and February 15, 2018.

ISSUE(S): Whether the funding allowance provided for the purchase of a [text deleted] [motorcycle #1] was properly calculated.

RELEVANT SECTIONS: Sections 138, 150 and 184 of The Manitoba Public Insurance Corporation Act (“MPIC Act”) and subsection 10(1) of the 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

Background:

[Text deleted] (the “Appellant”) was seriously injured in a motorcycle accident (the “MVA”) on October 2, 1998. His left leg was crushed, and had to be amputated below the knee. The Appellant received rehabilitation treatment at the [hospital], in order to assist him in using his prosthetic leg. Skin difficulties and phantom pain require him to use a wheelchair at times.

Prior to the MVA, the Appellant had been a frequent rider of [text deleted] two-wheeled motorcycles. Subsequent to the MVA, after he became comfortable with the use of his prosthetic, he continued to ride a two-wheeled motorcycle. Over time, though, he found it difficult to ride the two-wheeled motorcycle, due to ongoing skin difficulties with the prosthetic leg, including phantom pain. In addition, he became concerned for his safety while riding.

In 2009, [text deleted] developed a three-wheeled motorcycle called a [motorcycle #1], which was a three-wheeled version of [text deleted's] two-wheeled [motorcycle #2]. In February, 2010, the Appellant purchased a used 2009 [motorcycle #1] for [text deleted] (before tax). In January, 2011, the Appellant requested that MPIC contribute towards the purchase price of a [motorcycle #1].

MPIC considered the Appellant's request. The case manager issued a decision letter dated January 3, 2013, which provides as follows:

On February 26, 2010, you purchased a 2009 [text deleted] [motorcycle #1]. The purchase price before taxes was [text deleted], which included an extended warranty of [text deleted]. In speaking with [text deleted] in [text deleted], they advised that a 2009 [motorcycle #2] (2 wheeled) motorcycle would cost approximately [text deleted]. This results in a price difference of [text deleted].

As such, a cheque in the amount of [text deleted] was mailed to you on or about November 21, 2012.

To ensure a reasonable reimbursement, I also contacted [text deleted] in [text deleted] for a price difference between the [motorcycle #2] and [motorcycle #1]. The price you paid was below the msrp, and is in line with the price differential. (emphasis in original)

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager, as well as the applicable legislation, and issued an Internal Review decision dated April 4, 2013, which provides as follows:

I have reviewed the file material and feel that the allowance provided was fair and in line with the guidelines outlined in section 138. The case manager obtained multiple quotes for the two bikes involved and the allowance of [text deleted] was based upon those quotes. The PIPP plan is a cost replacement plan and taking into account your actual purchase cost of [text deleted], the allowance of [text deleted] is in line with the quotes obtained. I also note that this allowance was within the range of the amounts you originally suggested in your request of January 5, 2011.

As such I am upholding the decision and dismissing the Application for Review.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission. The issue which requires determination on this appeal is whether the funding allowance provided by MPIC to the Appellant for the purchase of a [text deleted] [motorcycle #1] was properly calculated.

Decision:

For the reasons set out below, the panel finds that the funding allowance provided by MPIC to the Appellant for the purchase of a [text deleted] [motorcycle #1] was not properly calculated.

Procedural Matters:

The parties made submissions on the initial hearing date, June 28, 2017. After that hearing, the panel convened to consider its decision and determined that additional information was required from the parties. In particular, the panel required additional information in order to assist it in considering the application and interaction of section 138 of the MPIC Act and subsection 10(1) of Manitoba Regulation 40/94, in light of the applicable case law (which was provided to the parties). Accordingly, the Appeal was reconvened on February 15, 2018, for the purpose of hearing additional submissions from the parties. In advance of the February 15, 2018, hearing, counsel for MPIC provided a written submission in the form of a letter dated August 25, 2017. In addition, the

Appellant provided a brief written submission in the form of an email dated November 16, 2017, as well as photographs accompanied by explanatory emails dated January 13, 2018.

Evidence and Submission for the Appellant:

Evidence:

The Appellant testified at the appeal hearing. He said that after the amputation in 1998, his life changed significantly. He thought he may still be able to ride a two-wheeled motorcycle, and so in 1999 he bought a 1998 [text deleted]. However, over time he felt it was becoming more difficult to ride a two-wheeled motorcycle safely, given his condition. Nevertheless, he still wanted to ride a motorcycle, but he realized he needed to make some changes. He looked into the possibility of converting his [text deleted] into a three-wheeled motorcycle, using a [text deleted] conversion kit. This would have cost between [text deleted] and [text deleted], and so he did not proceed with the conversion.

When the [text deleted] [motorcycle #1] three-wheeled motorcycle became available in 2009, the Appellant saw it as an opportunity to ride more safely, on a factory-made motorcycle. He went to [text deleted] in [text deleted] and checked out the prices. They were selling for approximately [text deleted] and he made a down payment of [text deleted] in the late fall of 2009 in order to purchase one. That motorcycle was to be built in 2010.

The Appellant said that he went to a dealership, [text deleted] in [text deleted], which had a used [motorcycle #1] on its lot for sale for [text deleted]. The salesman at [text deleted] was a personal friend, and the Appellant was able to negotiate a favourable purchase price for the [motorcycle #1] of [text deleted]. He was actually happy to be purchasing a used motorcycle, rather than investing in a new motorcycle, because he had never tried riding a [motorcycle #1] before. He cancelled his

order with [text deleted] in [text deleted] and lost his [text deleted] deposit. They were not happy that he cancelled his order. However, the Appellant was very happy with his [motorcycle #1].

He discussed this purchase with his case manager at MPIC. He told her that the [motorcycle #1] was something that he needed, as he could no longer ride a two-wheeled motorcycle safely due to the MVA. He asked if MPIC could pay him the amount of the purchase price. The case manager told him that MPIC would not pay for the [motorcycle #1], but would pay the difference between a two-wheeled motorcycle, such as the [motorcycle #2], and the [motorcycle #1]. She told the Appellant to put his request to MPIC in writing, which he did. He was left with the impression that if MPIC would not pay for the entire purchase price, MPIC would be equally unprepared to pay for the cost of converting his two-wheeled motorcycle into a three-wheeled motorcycle, which could be between [text deleted] and [text deleted].

Subsequent to the time that he purchased the [motorcycle #1], MPIC has assisted the Appellant by funding the purchase of a hand shifter, in order that he can change gears by hand. The Appellant has self-funded the purchase of a trailer and trailer package at a cost of approximately [text deleted], in order that he can take his wheelchair with him, which he requires when he has difficulty with his prosthesis.

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. Counsel noted that the case manager obtained prices from various dealerships in order to determine what the cost of an [motorcycle #2] was in 2009. The Appellant agreed that it was in the neighbourhood of [text deleted]. (In the case manager's decision dated January 3, 2013, the case manager noted that the price was approximately [text deleted].) The Appellant pointed out that his concern was with the price that MPIC had assigned to the [motorcycle #1]. He noted that in the

Internal Review decision, MPIC acknowledged that in 2010, these motorcycles retailed for [text deleted]. The Appellant noted that the used [motorcycle #1] that he bought was from Illinois and retailed for [text deleted]; it had 8000 miles on it. The Appellant acknowledged that he paid [text deleted] for the [motorcycle #1]; however, the case manager had promised him that he would be paid the difference between the retail prices of a [motorcycle #1] and an [motorcycle #2].

Counsel for MPIC questioned the Appellant as to whether he was looking for reimbursement from MPIC beyond what he had actually paid. The Appellant noted that he was out-of-pocket the entire [text deleted] purchase price for the [motorcycle #1].

On questioning from the panel, the Appellant clarified that the 2 wheeled motorcycle that he owned at the time that he purchased the [motorcycle #1] was the 1998 [text deleted]. That motorcycle is still in his possession, but he no longer rides it, as he can't do so safely. He did register it a few years ago in order that one of his friends could ride it in the [text deleted]. The 2009 [motorcycle #1] is what he uses for every day riding, unless it is raining. He called that [motorcycle #1] a "lifer", saying it will last him forever and he will not need another one.

Submission:

The Appellant noted that he asked the case manager to pay the entire amount for the [motorcycle #1], but the case manager told him that MPIC would only pay him the difference in price between the [motorcycle #1], a three-wheeled motorcycle and an equivalent two-wheeled motorcycle, being the [motorcycle #2] (although the Appellant didn't ever own an [motorcycle #2]). She told him to request this amount in writing. After he was told that, he wrote his email to the case manager asking to be reimbursed for the price difference.

He said he does appreciate the [text deleted] that was paid to him by MPIC, but noted that he was told he would be paid the actual price difference between the two motorcycles, which he also said is similar to the price to convert a two-wheeled motorcycle into a three-wheeled motorcycle. In his Notice of Appeal dated May 22, 2013, the Appellant stated:

I was told I would be credited the cost of converting a two wheeled bike to a more suitable 3 wheeled trike. This is a [text deleted] expense. I was given [text deleted].

This echoes his argument from his Application for Review dated January 24, 2013:

The cost of trike conversion is the cost of 2 wheeled factory bike compared to 3 wheeled bike factory (sic). ... Total conversion cost exceeding [text deleted]. Facts remain the same here and the price I received my bike at does not relate to what a conversion costs. I have received [text deleted] from what I was told would be the trike conversion cost. I'm asking for my additional [text deleted]. Thank you!

The Appellant argued that the fact that he was able to negotiate a more favourable purchase price for the [motorcycle #1] should not be taken into account when determining the amount to be paid to him, particularly since he is in fact out-of-pocket the [text deleted] that he paid for the [motorcycle #1] in the first place. He only had to buy the [motorcycle #1] because of the amputation, which was because of the MVA.

Submission for MPIC:

Counsel for MPIC noted that the issue is whether the funding allowance provided for the purchase of a [text deleted] [motorcycle #1] was properly calculated, and referred to the provisions of the relevant legislation, which are set out further below in these Reasons.

Counsel noted that MPIC acknowledged that as a result of the amputation caused by the MVA, the Appellant experiences fatigue and phantom pain, which impair his ability to safely ride a two-wheeled motorcycle, which had been his primary mode of transportation when seasonally

appropriate. Therefore, when the Appellant requested that MPIC fund the difference between a two-wheeled [motorcycle #2] and a three-wheeled [motorcycle #1], the case manager recommended to MPIC's management that this price difference should be funded.

As noted, the case manager identified in her decision letter that a 2009 [motorcycle #2] would have cost approximately [text deleted]. The Appellant paid [text deleted] for his [motorcycle #1]. Counsel therefore pointed out that the actual price difference between what the Appellant paid for his three-wheeled [motorcycle #1] and the cost of a two-wheeled [motorcycle #2] is [text deleted]. This amount was paid to the Appellant by MPIC on November 21, 2012. Counsel submitted that MPIC paid a reasonable amount towards the cost of the Appellant's [text deleted] [motorcycle #1] motorcycle, to facilitate his continued motorcycle use in accordance with section 138 of the MPIC Act, to help facilitate the Appellant's return to a normal life and reintegration into society.

The panel questioned counsel for MPIC regarding the legislation and the applicable case law and whether the Appellant may have been entitled to reimbursement for the entire price of the [motorcycle #1], given that MPIC has accepted that the use of the [motorcycle #1] was required because of the MVA. Counsel pointed out that on at least three occasions, the Appellant requested MPIC to fund the difference between an [motorcycle #2] and a [motorcycle #1], as opposed to payment of the entire purchase price for the [motorcycle #1]. Counsel also noted that the Appellant had purchased the [motorcycle #1] prior to consulting MPIC. In response to questions from the panel, counsel said that if the Appellant had contacted MPIC prior to the purchase, MPIC would have opted to fund a conversion of the Appellant's existing motorcycle into a three-wheeled motorcycle under subsection 10(1) of the Regulation, rather than fund the purchase price of a new motorcycle; this would have been the less expensive option and a reasonable way to facilitate his ability to ride safely.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated April 4, 2013, is incorrect. In particular, the Appellant needs to show, on a balance of probabilities, that the funding allowance provided to him by MPIC for the purchase of a [text deleted] [motorcycle #1] was not properly calculated.

After a careful review of all of the reports and documentary evidence filed in connection with this appeal and after giving careful consideration to the testimony of the Appellant and to the submissions of the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation and applicable case law, the Commission finds as follows:

Legislation

The relevant provisions of the MPIC Act are as follows:

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers neces[text deleted]y or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

- (a) confirm, vary or rescind the review decision of the corporation; or
- (b) make any decision that the corporation could have made.

Manitoba Regulation 40/94 provides, in part, as follows:

Rehabilitation Expenses

10(1) Where the Corporation considers it neces[~~text deleted~~]y or advisable for the rehabilitation of a victim, the Corporation may provide the victim with any one or more of the following:

- (a) funds for an extraordinary cost required to adapt one or more motor vehicles for the use of the victim as a driver or passenger;

...

Communication with Case Manager

The Appellant purchased the [motorcycle #1] on February 26, 2010 for [text deleted]. File notes from a meeting with his case manager from December 10, 2010, state as follows:

[The Appellant] advised that he would like to be reimbursed for the difference of one type of bike for another type of bike. I advised that he would need to put his request in writing so that I can review it with my supervisor. I asked him to put as much information as possible in writing.

The Appellant provided an email to the case manager dated January 5, 2011, which provided as follows:

I have been a motorcyclist for 19 years. In October 1998 I was in a (sic) incident where my left leg was amputated. The next 11 seasons have been hard ones for me due to the condition of my residual limb and constant severe phantom pains. Spring of 2009 [text deleted] developed a 3 wheeled version of their [motorcycle #2], known as the [motorcycle #1]. I have been for many years looking into a trike conversion for my [text deleted], [text deleted]. This [text deleted] conversion kit would run me into the [text deleted] mark expense. With this new ready made, factory warranted [motorcycle #1] now out I was sure this is the bike I need but none were available in 2009 here in [text deleted]. In Spring of 2010 I priced out this new bike at [text deleted] of [text deleted] and one was ordered for me costing at [text deleted]. To my advantage, I found a used 2009 [motorcycle #1] in [text deleted] at [text deleted] for [text deleted] plus taxes. Because of my friendship with the owner and my long-time patronage to a [text deleted] dealership he also owns, after 2 weeks of deal making I was able to buy this American deal with 14,000 miles for [text deleted]. After one full season of riding this Trike my riding ability and safeness has risen right to where it once was before my amputation. I can now ride safely as I feel and not only when my leg allows. This new way of riding, although a bit different than I have in the past, is a change I now feel should have been made years earlier. The [motorcycle #1] is the trike conversion made from what was already known as the [motorcycle #2]. This bike runs around the [text deleted] plus taxes mark. I know (sic) feel a compensation amount is necessary due to the fact this trike is

only bought and needed because of my amputated leg. The cost difference in these two bikes varies from new to used, dealership to dealership and of course Canadian to American. Facts remain the same due to my amputation and the ability to keep riding as I have for many years, the [motorcycle #1] was in a medical way, necessary purchase. I now feel the [text deleted] extra expense is a claimable amount and something that should be addressed and hopefully agreed on in a fair amount of time. Further information on motorcycle values and legal paper work is available at any time. Please feel free to call at any time. Thanks ...

It took some time for MPIC to review this matter. In the interim, as noted above, MPIC did pay for the installation of a hand shifter for the [motorcycle #1], which was funded by the end of October, 2011. On March 30, 2012, the Appellant met with his case manager and provided her with the names of three motorcycle dealerships, in order that she could obtain price ranges for [motorcycle #1] and [motorcycle #2].

A memo dated June 7, 2012, prepared by the case manager reflects that she did obtain such price ranges, and that she further recommended that a payment should be made to the Appellant. The case manager's memo provides as follows:

He purchased the 2009 [motorcycle #1] in 2010 for [text deleted]. The 2009 [motorcycle #2] would have cost approximately [text deleted] in 2010 for difference of [text deleted] (confirmed with [text deleted]). This amount appears reasonable based on the information received from three [text deleted] dealers ...

...

He has been a motorcyclist for 19 years. Riding a [text deleted] was his main method of transportation (seasonal) and continues to be his main method of summer transportation. [the Appellant] is heavily involved in a [text deleted] way of life, and this community has always been a large part of his life and identity. He takes road trips in the summer to [text deleted] events.

After his amputation, [the Appellant] was unable to travel to [text deleted] safely prior to his purchase of the [motorcycle #1]. He said he did try to travel to [text deleted] on a regular bike, however, he often was not able to ride home due to safety concerns from phantom pain and fatigue. He said that since he has had his [motorcycle #1], he has no worries about driving due to the pain, as he feels safe and stable.

[the Appellant] travels by motorcycle frequently to [text deleted], and to smaller communities around [text deleted], such as [text deleted] (30-45 minutes away). He would be unable to do this without the 3 wheeled motorcycle.

I recommend MPI fund the vehicle modifications, to allow him to safely travel to his medical appointments and social events using his preferred method of summer transportation. This will also allow him to maintain his independence and sense of identity within the community.

What is the Correct Amount of the Funding Allowance

As counsel for MPIC noted in her written submission dated August 25, 2017, “MPIC accepted that [the Appellant] considered the purchase of a three wheeled motorcycle as a result of injuries sustained in the accident ...”. There is, accordingly, no dispute between the parties as to whether the purchase of the [motorcycle #1] was necessitated by the MVA; rather, the dispute centres on the amount of the funding allowance paid by MPIC to the Appellant under section 138 of the MPIC Act for the purchase of the [motorcycle #1].

Given that MPIC has accepted that the Appellant’s use of a three-wheeled motorcycle was a neces[~~text deleted~~]y component of his rehabilitation under section 138 of the MPIC Act in order to facilitate his return to a normal life and his reintegration into society, then the amount that should be paid to him must be considered in the context of the applicable facts and case law.

The Appellant has argued that the amount paid to him, [~~text deleted~~], is insufficient, in that it does not reflect the actual difference in price between an [motorcycle #2] and a [motorcycle #1]. He submits that MPIC should have ignored the fact that he was able to negotiate a favourable price when he purchased the [motorcycle #1]. He has also argued that he should be entitled to the amount required to convert a two-wheeled motorcycle into a three-wheeled motorcycle.

MPIC argued that the Appellant was paid the proper amount: the actual difference between the amount that he paid for his [motorcycle #1] and the cost of an [motorcycle #2].

The panel notes that the Appellant is, in fact, out-of-pocket for the entire purchase price of the [motorcycle #1], [text deleted] (before tax). The Commission has previously considered a claim for reimbursement of the entire purchase price of a vehicle, where the particular vehicle was neces[text deleted]y due to injuries suffered in an accident. In AC-01-04, the Commission held as follows:

... this Commission finds that Section 138 can be reasonably interpreted to cover the expenses related to the purchase of the motor vehicle given that it is neces[text deleted]y and advisable in order to lessen the disability resulting from the Appellant's bodily injury, and to facilitate his return to a normal life or reintegration into society or the labor market.

The Commission's decision was upheld by the Manitoba Court of Appeal, in 2008 MBCA 128. Although the Court of Appeal decision dealt with the other issue under appeal at the Commission, the court did not disturb the Commission's decision on this issue.

Therefore, the panel is of the view that, had the Appellant approached MPIC in advance of purchasing the [motorcycle #1], the Appellant could have requested MPIC to fund the entire purchase price of the [motorcycle #1] and, based on the above-noted case, MPIC may have been required to do so. The fact that the Appellant may not have known to make that request is not material; see section 150 of the MPIC Act above. MPIC has a positive duty under the MPIC Act to assist claimants in receiving compensation. However, it appears that the Appellant did not approach MPIC in advance of making the purchase; rather, he went to the case manager only after having already purchased the [motorcycle #1]. At that point, MPIC was faced with a *fait accompli*.

As indicated above, under subsection 184(1) of the MPIC Act, on an appeal, the Commission can make any decision that MPIC could have made. Given that the Appellant approached MPIC only

after he had already purchased the [motorcycle #1], this leaves the panel to assess what compensation should be given to the Appellant now.

When questioned by the panel, counsel for MPIC stated that if the Appellant had contacted MPIC prior to the purchase, MPIC would have opted to fund a conversion of the Appellant's existing motorcycle into a three-wheeled motorcycle under subsection 10(1) of the Regulation, rather than fund the entire purchase price, as this would have been the less expensive option. The panel considers that this would have been a reasonable decision by MPIC, as the conversion would have been a reasonable way to contribute to the rehabilitation of the Appellant by providing him with a three-wheeled motorcycle under section 138 of the MPIC Act, in order to facilitate his return to a normal life and reintegration into society. The panel therefore considers it to be reasonable to use the cost of the conversion under subsection 10(1) of the Regulation as a benchmark for the amount of the funding allowance that now should be paid to the Appellant.

The Appellant's evidence during his direct testimony, which was not challenged on cross-examination, was that the conversion of his Springer Softail motorcycle would have cost between [text deleted] and [text deleted]. In his January 5, 2011, email to the case manager, the Appellant stated that:

I have been for many years looking into a trike conversion for my [text deleted]. This Leman conversion kit would run me into the [text deleted] mark expense.

The panel accepts, and finds, that the average cost of the conversion of the Appellant's [text deleted] was [text deleted]. This is consistent with the amount set out in the Appellant's Notice of Appeal and Application for Review, as noted above. Based on this finding, we further find that the appropriate funding allowance for the Appellant is [text deleted]. Since MPIC has already paid

[text deleted] to the Appellant, we conclude that MPIC is to pay an additional [text deleted] to the Appellant as a further funding allowance.

Trailer and Trailer Package

Although this issue is currently not before the Commission on appeal, it is the Commission's view, based on the evidence we heard, that it would be reasonable for MPIC to reimburse the Appellant for the trailer and trailer package that he purchased to attach to the [motorcycle #1] in order to transport his wheelchair, if he can produce receipts.

Disposition:

For the reasons outlined herein, the Commission finds that the Appellant has established, on a balance of probabilities, that the funding allowance provided by MPIC to him for the purchase of a [text deleted] [motorcycle #1] was not properly calculated. The Commission finds that the Appellant shall be entitled to a further funding allowance of [text deleted].

The Appellant shall be entitled to interest upon the monies due to him by reason of the foregoing decision, in accordance with section 163 of the MPIC Act.

Accordingly, the Appellant's appeal is allowed and the Internal Review decision dated April 4, 2013 is therefore rescinded.

The Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation, either party may refer this issue back to the Commission for final determination.

Dated at [text deleted] this 1st day of May, 2018.

JACQUELINE FREEDMAN

BRIAN HUNT

SANDRA OAKLEY