

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-17-103**

PANEL: Pamela Reilly, Chairperson
Dr. Sharon Macdonald
Paul Taillefer

APPEARANCES: The Appellant, [text deleted], was represented by Ken Kaltornyk from the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Morley Hoffman.

HEARING DATE: February 16, 2021

ISSUE(S): Is the Appellant entitled to reimbursement from MPIC for the cost of her two birds?

RELEVANT SECTIONS: Sections 136, 138 and 184(1) of the Manitoba Public Insurance Corporation Act ('MPIC Act') and 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:

On November 17, 1995 another driver rear-ended the Appellant's vehicle while she was stopped at a pedestrian crosswalk ("the MVA"). She sustained a soft tissue injury to her neck and back. The MVA also exacerbated the Appellant's pre-existing bipolar disorder.

Since the MVA, the Appellant's injuries have worsened and she currently suffers from chronic pain and depression, in addition to her pre-existing psychological condition. The

Appellant has been unemployed since 2009 and currently receives CPP Disability benefits. She takes daily medication to manage her psychological condition, and regularly participates in supportive psychotherapy with a registered psychologist.

The Appellant attended her supportive psychotherapy sessions with her bird named [text deleted]. In 2016 [bird #1] died and the Appellant replaced [bird #1] with two “sun conure” birds. “Sun conures” are medium sized parrots; the same species as [bird #1].

In February 2017, the Appellant requested reimbursement from MPIC for the \$1,000.00 purchase cost of the two birds, on the basis that they are “service” or “therapy” animals. By Internal Review Decision dated July 17, 2017 (“the IRD”), MPIC denied her request on the basis that the expense did not fall within MPIC Act section 136(1), and section 5 of Manitoba regulation 40/94. The Appellant appealed that decision to the Commission.

Issue:

Is the Appellant entitled to reimbursement from MPIC for the cost of her birds?

Decision:

The panel grants the appeal and rescinds the July 17, 2017 IRD. The panel finds that it is necessary and advisable for the rehabilitation of the Appellant to have one bird. The panel therefore directs MPIC to provide the Appellant with funds in the amount of \$500.00, which is half the total \$1,000.00 purchase expense for two birds.

Appellant testimony:

The Appellant testified that as a result of her MVA, she suffers chronic mental illness, the most serious of which is depression with daily suicidal ideation. Her psychological condition has declined over the years. Her representative referred the Appellant to documentation which showed that MPIC’s permanent impairment rating for her psychological condition had increased in 2007, from 20% to 45%. She said that in 2007, despite just completing her Doctoral degree in [text deleted], she ‘crashed.’

The Appellant said that since 2009 she is “completely impaired” and therefore totally incapable of employment. She agreed with her therapist’s conclusion that, because of her

psychological condition, she is probably unable to teach full-time. She confirmed the August 5, 2014 medical report from her former psychologist [text deleted] that she is “seriously depressed and chronically suicidal.”

The Appellant uses a number of strategies to manage her suicidal thoughts. She said she diligently takes her daily medications. She talks to people she trusts who can help her. She gardens and makes crafts that she donates. She testified that when she becomes angry or agitated she will “spend a lot of time with my service animals.” These animals are her two sun conure parrots (the “birds”).

The Appellant testified that the birds need daily care and attention from her. She said, “I will not get up to take care of myself but I will get up to take care of them.” The birds are loud when they vocalize and have a natural diurnal pattern which, she said, reminds her to take her morning and evening medications. She explained that when possible, she takes her birds wherever she goes, and they provide her “some relief from [her] severe mental problems”.

She testified the birds reduce her stress and distract her from her suicidal thoughts because “they’re positive” and “reinforce me with [the] positive reactions I get from people.” In cross-examination the Appellant confirmed she takes her birds to therapy sessions because “they help distract me from serious issues and relax so I [can] function better.”

The Appellant confirmed that it takes many hours to train the birds and she uses behaviour modification techniques. The Appellant trains the birds because this establishes and strengthens the bond between them. In cross-examination, the Appellant confirmed that the birds were four months old when she purchased them. She explained that the training should start when the birds are a couple of months old to ensure that they bond with her and comply with commands. She said that she acquired her training knowledge from questioning those who sell and breed these birds, reading books, from her past knowledge of behaviour modification techniques, and working with lab animals.

The Appellant testified that when her bird, [bird #1], died she realized how much she depended on [bird #1] to maintain her mental health. The Appellant also acquired a companion bird ([bird #2]) for [bird #1] which apparently did not accompany the Appellant to her psychotherapy sessions. When [bird #1] died, [bird #2] lost his companion bird, and so the Appellant reasoned it was best to purchase two baby birds (the costs for which she seeks reimbursement) who would be companions for [bird #2], and then for each other, when [bird #2] eventually died. She confirmed that although training is much easier with one bird, she reiterated that her purchase of two birds was for their benefit. In cross-examination the Appellant confirmed that she is seeking \$1,000.00 total reimbursement for the purchase of two birds.

Medical records:

The Appellant's psychotherapist, [text deleted] in his letter dated November 17, 2015, stated as follows:

"[The Appellant] benefits greatly from...her small cockatiel-sized bird named [bird #1]. [The Appellant] brings her pet bird to all therapy sessions [and] assists [the Appellant] in a variety of ways that mitigate her mental health and physiological symptoms."

In a letter to MPIC's Senior Case Manager, dated June 19, 2017, [Appellant's psychotherapist] wrote:

As stated, ongoing therapy helps [the Appellant] cope with a wide variety of issues, such as chronic physical and cognitive decline in functioning, Major Depressive Disorder, anxiety around triggers pertaining to the MVAs, chronic pain, cognitive impairment, grief and loss, and multiple physical problems. Coping skills continue to be maintained and developed such as engaging in very limited volunteer work, using adult colouring books and novels on tape for distraction, and engaging in bonding and behavioural training with her therapy birds.

Finally, in a letter to Mr. Kaltornyk, dated December 30, 2017, [Appellant's psychotherapist] stated:

[The Appellant] receives significant assistance from her therapy birds. Quite frankly, they keep her from committing suicide. The birds provide a sense of purpose, comfort and companionship. In addition, due to the fact that they require training, care, and maintenance throughout the day[,] her birds significantly distract her from her persistent and chronic suicidality, traumatic symptoms, and depression.

Appellant closing submissions:

Mr. Kaltornyk submitted that the birds were “medically required” because of the MVA. Therefore, MPIC is obligated to reimburse the expense. He referenced the *Manitoba Human Rights Commission Board of Commissioners Policy (Policy # 1-9 version 1.1)* that was part of the material and submitted that the birds would qualify as “service animals” which, by definition would be medically required. Alternatively, Mr. Kaltornyk submitted that irrespective of their classification as “service animals” the birds are medically required to assist with the Appellant’s mental health issues.

Mr. Kaltornyk reviewed the medical evidence that showed the Appellant’s deteriorating psychological condition and her diagnosis of chronic suicidal depression. He reviewed the Appellant’s testimony of how the birds help the Appellant cope with her suicidal thoughts by distracting her from those thoughts and giving her a reason to get out of bed. He reiterated that the birds meet the criteria for designation as service animals.

Mr. Kaltornyk noted the Health Care Services opinion of psychologist, [text deleted], whom MPIC had requested provide an opinion on whether the birds qualified as service animals. [MPIC’s HCS psychologist] declined to answer that question on the basis that it was a policy issue for MPIC. However, [MPIC’s HCS psychologist] acknowledged that the Appellant’s condition was MVA related.

Mr. Kaltornyk described the issue as complex. He submitted that MPIC does not consistently apply the term “medically required.” Nonetheless, there is no question that the Appellant suffers a very serious medical condition which MPIC has accepted as MVA related. Under any possible definition, a measure that helps the Appellant avoid suicide would be considered “medically required.” In rebuttal, he pointed out that MPIC Act s.138 speaks to facilitating the victim’s reintegration into society and that the Appellant’s birds meet that criteria.

MPIC closing submissions:

Mr. Hoffman referred to MPIC Act s. 138 as the applicable legislation but discounted MPIC's obligation to fund the birds as "a necessary or advisable measure." He noted that there is no further guidance in the Act or Regulations that speaks to funding for service animals.

On the issue of whether the birds qualified as service animals, he submitted that the Human Rights Code (the "Code") offered some guidance in its policy. However, Mr. Hoffman pointed out that the policy is from 2015, implying that it is dated. Further, the Code defined a service animal as one that has been trained to provide assistance. He submitted that the Appellant's evidence did not meet the Code definition that the birds had been trained to provide assistance. Further, Mr. Hoffman said that there was no evidence to show that any emotional support from the birds mitigated the Appellant's suicidal ideation.

Mr. Hoffman submitted that classifying dogs as service animals is qualitatively distinct from classifying the Appellant's birds as service animals. That is, service dogs guide humans, they can create space for and re-direct humans (which, presumably, the birds can not). He said that the expense for the birds was more akin to what MPIC classifies as 'comfort' expenses (for example, costs for cable TV or flowers); expenses that MPIC typically denies.

In this case, he submitted, the Appellant's psychotherapy reports were of minimal weight because they failed to describe how the birds assist the Appellant. Finally, Mr. Hoffman submitted that the legislature must determine and define what constitutes a service animal, as well as determine the scope of any associated costs. Therefore, he submitted the panel should confirm the IRD and dismiss the appeal.

MPIC Act Section 138 and *Menzies* submissions:

Prior to its decision, the panel invited the parties to provide written submissions on MPIC Act section 138 and the Commission's application of that section in AC-03-132 and AC-05-113, as well as the court case of [text deleted] v. *MPIC et al.*, 2005 MBCA 97.

Mr. Kalturnyk submitted that the parties agreed that s.138 was applicable and that s.10 of Regulation (“Reg.”) 40/94 was not. They also appeared to agree that the [text deleted] case applied here.

Mr. Kalturnyk submitted that per [text deleted], s. 138 was subject to but not limited by s. 10 itemized expenses. Further, [text deleted] emphasized the purpose of the expense, as opposed to the exact nature of the expense. Therefore, expenses that were not covered by Reg. 40/94, s. 10 (and by implication, the Appellant’s expense) may be considered under MPIC Act s. 138.

Mr. Kalturnyk submitted that the Appellant’s birds reduced the Appellant’s stress and depression and increased her daily functioning. Therefore, pursuant to the wording in s.138, the Appellant’s birds lessened her disability and facilitated her return to a normal life and/or her reintegration into society. The expense is therefore covered, irrespective of whether the birds are designated as service animals.

Mr. Hoffman submitted that the question before the Court of Appeal in [text deleted] was whether the Commission had the power to exercise its discretion and allow rehabilitation expenses that did not fall within s. 10(1) of Reg. 40/94. He distinguished [text deleted] from this case in stating that the Appellant’s expense is “not in keeping with the letter or the spirit of the MPIC legislation.”

He submitted that the MPIC Act is intended to provide compensation based on “real economic loss”, and “MPIC is not obligated to reimburse a claimant for every possible expense that might contribute to rehabilitation or lessen a disability.” He submitted that “the expenses here are not even close or akin to any allowable expense” and are distinguishable from the “attendant” expenses allowed in [text deleted]. As such, the Appellant’s expenses do not fall within s. 138 or the principles set out in [text deleted].

Legislation:

The pertinent sections of the MPIC Act and Regulations are as follows:

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary 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.

Reimbursement of victim for various expenses

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;

Manitoba Regulation 40/94

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expenses under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) When care is medically required and is dispensed in the province by a physician, nurse practitioner, clinical assistant, physician assistant...

Rehabilitation expenses

10(1) Where the corporation considers it necessary 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;

(a.1) funds for an extraordinary cost required to adapt a motor vehicle for the use of a victim in employment, if the corporation is satisfied that payment of the cost will have the effect of reducing the total amount payable to the victim or on the victim's behalf under Part 2 of the Act;

- (b) funds for an extraordinary cost required

- (i) where the victim owns his or her principal residence, to alter the residence or, where alteration is not practical or feasible, to relocate the victim,

- (ii) where the victim does not own his or her principal residence, to relocate the victim or, where relocation is not practical or feasible, to alter the victim's residence, or
 - (iii) to alter the plans for or construction of a residence to be built for the victim;
- (c) funds for an extraordinary cost required to alter the victim's primary residence, where the victim is moving in order to accommodate an approved academic or vocational rehabilitation plan, or the victim was a minor or dependant at the time of the accident who is moving from the family home;
- (d) reimbursement of the victim at the sole discretion of the corporation for
- (i) wheelchairs and accessories,
 - (ii) mobility aides and accessories,
 - (iii) medically required beds, equipment and accessories,
 - (iv) specialized medical supplies,
 - (v) communication and learning aides,
 - (vi) specialized bath and hygiene equipment,
 - (vii) specialized kitchen and homemaking aides, and
 - (viii) cognitive therapy devices;
- (e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

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.

Substantive Issue:

Is the Appellant entitled to reimbursement from MPIC for the cost of her birds?

Discussion and findings:

Credibility and reliability

Neither party raised concerns or made submissions on the issue of credibility and reliability. The panel found the Appellant's testimony cogent and internally consistent, as well as consistent with the documents. She did not exaggerate or embellish her evidence. She had good recall of facts and events. The panel finds her testimony credible and reliable.

MPIC does not dispute that the Appellant's current psychological condition was caused by her MVA.

Applicable legislation

The IRD applied section 136(1) of the Act, and section 5 of Regulation 40/94. Those sections deal with reimbursement of expenses and require expenses to be "medically required." The panel agrees with the parties and finds that s.138 (not MPIC Act s.136, Reg. 40/95, s. 5) is the applicable section in this case.

***Menzies* decision**

The panel agrees with the parties that the [text deleted] decision deals with the relationship between s.138 and s.10 of Reg. 40/94. The panel also agrees and finds that the expense for which the Appellant seeks reimbursement does not fall within s.10 of Reg. 40/94.

In [text deleted] the Appellant sought reimbursement for travel expenses related to non-medical appointments and recreational events, including the costs for a family member or attendant to accompany him. In [text deleted], paragraph 35, the Court of Appeal pointed out that the objectives in s.138 go beyond rehabilitation (i.e., s. 138 includes measures to "lessen a disability resulting from bodily injury" and "facilitate the victim's return to a normal life or reintegration into society or the labour market"). As such, this suggested a legislative intent to assist recovery in a more extensive way beyond the expenses specifically delineated in s.10 of Reg. 40/94. More particularly, the Court stated the "objectives in s. 138 may well be focussed on those victims with mental disabilities."

The Court further stated at page 18, as follows:

Where, as here, the expenses sought to be reimbursed do not fall within any provision of the regulations at all, there are consequently no applicable limitations in the regulations on the exercise by MPIC of the power set out in s. 138. MPIC is then mandated to take any measure which, in its discretion, it considers necessary or advisable to achieve one or more of the objectives set out in s. 138.

The Court made the following finding at page 23, which the panel adopts:

...it is clear to me that s. 138 is easily broad enough to encompass the reimbursement of particular expenses for victims. First, the section is framed in terms of individual victims, not victims as a class.

The panel finds that each consideration for assistance pursuant to s. 138 must be considered on the merits of the particular expense for a particular individual.

In [text deleted], the Commission found that MPIC had failed to fulfill its statutory obligation to consider the Appellant's request for reimbursement of travel and attendant expenses under s. 138. The Commission therefore referred that case back to MPIC for consideration. In this case, MPIC has apparently considered s. 138 and declined to reimburse the Appellant's expense for the purchase of her birds.

The panel agrees with Mr. Hoffman that MPIC is not obligated to reimburse a claimant for every possible expense that might contribute to rehabilitation or lessen a disability. However, the panel disagrees that the expense in this case is akin to the 'comfort' expenses referred to by Mr. Hoffman. The panel also disagrees that the psychotherapy reports do not describe how the birds assist the Appellant.

The Appellant's psychological reports state that the birds "mitigate her mental health and psychological symptoms", and that the Appellant's "coping skills are maintained and developed...engaging in bonding and behavioural training with her therapy birds". Significantly, one report stated, as follows:

[The Appellant] receives significant assistance from her therapy birds. Quite frankly, they keep her from committing suicide. The birds provide a sense of purpose, comfort and companionship. In addition, due to the fact that they require training, care, and maintenance throughout the day[,] her birds significantly distract her from her persistent and chronic suicidality, traumatic symptoms, and depression.

This evidence is compelling and was not challenged by MPIC.

The Appellant testified that she received benefit from her single bird, [bird #1]. She testified that she keeps more than one bird to ensure that the birds have companions. While the Appellant spoke in terms of her 'birds', she did not testify that more than one bird is necessary to lessen her disability or distract her from suicidal thoughts and depression. Further, although the more recent psychotherapy reports now refer to the Appellant's "birds", there is no evidence in the reports that the Appellant needs multiple birds to assist her mental health.

Therefore, pursuant to s.138, the panel finds that the Appellant has proven on a balance of probabilities that training, maintaining and caring for a sun conure bird contributes to her rehabilitation by lessening her mental disability and facilitating both her return to a normal life and reintegration into society. As such, the panel finds it necessary and advisable to fund the cost of one bird.

Pursuant to MPIC Act s. 184 the panel has the power to confirm, vary or rescind the IRD, or make any decision that MPIC could have made. The panel therefore rescinds the IRD and substitutes its decision directing that MPIC reimburse the Appellant \$500.00 for the expense of purchasing one bird.

Finally, the panel considered the submissions about whether or not the birds are "service animals" or "therapy animals". The panel declines to make a finding on that issue. The panel agrees with Mr. Hoffman and the HCS consultant that this is a policy issue that is best left to the legislature.

Disposition:

The panel allows the appeal and rescinds the Internal Review Decision dated July 17, 2017. The panel directs that MPIC reimburse the Appellant \$500.00 for the purchase cost of one sun conure bird.

Dated at Winnipeg this 11th day of May, 2021.

PAMELA REILLY

DR. SHARON MACDONALD

PAUL TAILLEFER