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Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-73

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Mr. Errol Black

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Phil Lancaster of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATE: November 13, 2008

ISSUE(S): 1. Entitlement to Further Physiotherapy Treatment Benefits
2. Entitlement to Personal Care Assistance Benefits for Snow Clearing

RELEVANT SECTIONS: Sections 131 and 138 of *The Manitoba Public Insurance Corporation Act* ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident on July 24, 2004, when his vehicle was rear-ended by a hit and run driver. As a result of this accident, the Appellant sustained soft tissue injuries to his neck, shoulders and back. Due to the bodily injuries which the Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act.

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

1. Internal Review decision dated April 5, 2005 – re: entitlement to personal care assistance benefits for snow clearing; and
2. Internal Review decision dated June 6, 2005 – re: entitlement to further physiotherapy treatment benefits.

At the outset of the hearing, the Claimant Adviser on behalf of the Appellant advised that the Appellant was withdrawing his appeal from the Internal Review decision of June 6, 2005 respecting the termination of funding for physiotherapy treatments.

The Internal Review decision of April 5, 2005 confirmed the case manager's decision of February 7, 2005 and dismissed the Appellant's Application for Review. The Internal Review Officer determined that there was no entitlement to personal care assistance benefits unless a claimant attained a minimum assessment tool score of nine points. Since the Appellant had scored only three points on the personal care assistance tool, he did not qualify for personal care assistance for snow clearing.

At the hearing of the appeal, the Claimant Adviser, on behalf of the Appellant conceded that the Appellant did not meet the threshold for eligibility for the reimbursement of expenses for snow clearing pursuant to the Personal Care Assistance tool. However, the Claimant Adviser argued on behalf of the Appellant that:

- The Appellant's driveway and access to his water pump were essential not only to him, but also to his wife and to the community. Without access to his home, utility personnel

could not maintain Hydro services. Without access to his water pump, the Appellant could not ensure maintenance of his access to potable water. This posed a potential health risk to the community as a whole. Accordingly, his snow clearing needs were not just personal care assistance for the Appellant's own personal needs.

- [The Appellant's] expenses were rehabilitation expenses within the meaning of Section 138 of the Act – without adequate snow clearing, [the Appellant] could not participate in his community. His access to and egress from his home would restrict his social interactions. It would prevent utility personnel from entering his property to maintain Hydro and telephone services. He would not be able to service his water pump, putting at risk his access to potable water at his house. This would bring snow clearing within the definition of rehabilitation in its meaning of “social restoration”.
- Safety – without adequate snow clearing, [the Appellant] could not live in his home safely. Emergency services such as paramedics, fire trucks and others, would not have reliable access to his home should he or his wife or others in the home require them.
- Essential service – [the Appellant's] rehabilitation would not be complete if an essential element of his daily life was not ensured. The Claimant Adviser also argued that access to his water pump would be essential to his health and that of his family.
- Rehabilitation coverage is intended to respond to the personal situation of a claimant.

Taking into consideration the totality of the Appellant's situation, the Claimant Adviser submits that the Appellant's circumstances are such that he cannot, as a result of the injury suffered in the motor vehicle accident, shovel his snow. The Appellant does not meet the requirements of Section 131 and the Regulations enacted pursuant thereto in order to qualify for personal care assistance. As a result of his injuries and his inability to shovel his snow, he has incurred expenses for snow clearing, an essential element of life required for safety and social rehabilitation. The Claimant Adviser maintains that it is essential for the Appellant to have assistance with snow removal in order to facilitate his return to a normal life and to ensure his reintegration into society. Accordingly, the Claimant Adviser submits that the Appellant's snow clearing expenses are rehabilitation expenses and therefore come within Section 138 of the MPIC Act and should be reimbursed pursuant to that section.

Counsel for MPIC submits that yard work, including essential snow removal, clearly falls within Section 131 of the MPIC Act. Since the Appellant does not score the requisite nine points in

order to qualify for personal care assistance, his expenses for snow removal do not come within the coverage for personal care assistance provided under Section 131 of the MPIC Act.

Counsel for MPIC also submits that the Appellant's snow removal expenses cannot be covered under Section 138 of the MPIC Act as rehabilitation expenses. In support of her position, counsel for MPIC relies on the decision of the Manitoba Court of Appeal in *Fletcher v. Manitoba Public Insurance Corporation et al*, 2008 MBCA 128. In that decision, Scott, C.J.M. noted that:

The jurisprudence in this province is quite clear that sec. 138, despite its broad wording, cannot be used as a top-up or add-on for an expense that properly falls within the four corners of sec. 131. They are different sections intended to provide for different needs. In *Menzies v. Manitoba Public Insurance Corp. et al*, 2005 MBCA 97, 195 Man.R. (2d) 257, one of the questions before the court concerned the "limitations on the broad power conferred by s. 138 on MPIC" (at para. 50). Interpreting sec. 138 so as to yield "a coherent, harmonious and logical result" (at para. 49), it was concluded that (at para. 52):

Together these provisions constitute a payment regime covering expenses of a person accompanying a victim when that person obtains care. Section 138 could not be the means by which further or greater such expenses could be reimbursed.

Relying upon that case, counsel for MPIC maintains that expenses incurred for snow removal cannot be covered pursuant to Section 138 of the MPIC Act.

Upon a careful review of all of the documentary evidence made available to it, and upon hearing the submissions made by the Claimant Adviser and by counsel on behalf of MPIC, the Commission finds that the Appellant is not entitled to reimbursement of his snow clearing expenses pursuant to Section 138 of the MPIC Act. We find that the decision of the Manitoba Court of Appeal in *Fletcher v. Manitoba Public Insurance Corp. et al* is binding authority. The decision is quite clear that Section 138 cannot be used as a top-up or add-on for an expense that properly falls within the four corners of Section 131 of the MPIC Act. Snow removal comes

within yard work and is included in the personal care assistance tool enacted pursuant to Section 131 of the MPIC Act. As a result, the Commission finds that the Appellant does not qualify for reimbursement of his snow clearing expenses pursuant to either Section 131 of the MPIC Act or Section 138 of the MPIC Act. Accordingly, the Appellant's appeal of the Internal Review decision dated April 5, 2005 is dismissed and the Internal Review decision dated April 5, 2005 is therefore confirmed.

Dated at Winnipeg this 15th day of December, 2008.

YVONNE TAVARES

NEIL COHEN

ERROL BLACK