

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-010**

PANEL: Ms Jacqueline Freedman, Chair
Dr. Sharon Macdonald
Dr. Lorna Turnbull

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

HEARING DATE(S): January 16, 2019

ISSUE(S): Whether reimbursement for the cost of a new mattress is
medically required.

RELEVANT SECTIONS: Sections 136, 138, 171 and 184 of The Manitoba Public
Insurance Corporation Act (“MPIC Act”) and subsection
10(1) of 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 motor vehicle accident (the “MVA”) on August 31, 2002. She was ejected through the front window of the vehicle and suffered multiple injuries, including the following:

- C2 fracture;

- right femur fracture;
- left tibia fracture;
- left ankle fracture;
- pelvic fracture;
- bladder rupture;
- liver puncture;
- shortening of the left leg; and
- traumatic brain injury.

As indicated, the Appellant suffered a head injury in the MVA. Her Glasgow Coma Score was 8 at the accident scene; she was described as having a decreased loss of consciousness and she was nonverbal. She was 18 at the time of the MVA and had not finished grade 12.

The Appellant was treated in hospital for her various injuries. She required multiple surgical procedures, and underwent extensive rehabilitation. The Appellant also received Personal Injury Protection Plan (“PIPP”) benefits under the MPIC Act. In addition to various treatment and income replacement benefits, the Appellant received permanent impairment benefits under the MPIC Act in the amount of 84.4% of the maximum entitlement.

In 2004, MPIC funded the Appellant’s purchase of a mattress and box spring, based on the recommendation of her physiotherapist. In 2015, the Appellant approached MPIC and asked that the purchase of a new mattress be funded, because she was having ongoing problems due to her MVA injuries.

MPIC considered the Appellant’s request. The case manager issued a decision letter dated July 27, 2015, which provides as follows:

... this letter is in regards to funding for a new mattress for a bed.

The medical information on file has been reviewed by our Health Care Services Team. The medical information indicates that there is insufficient evidence to support that a new

mattress is medically required in relation to the above-noted motor vehicle accident. Therefore, there is no entitlement to funding for a mattress.

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 and the applicable legislation, and issued an Internal Review decision dated October 6, 2015, which provides as follows:

If coverage is available for the new mattress you are seeking, it will have to be found in the provisions relating to rehabilitation expenses. These are found in Section 138 of the *Act* and Section 10 of Regulation 40/94 (attached).

...

In order for you to succeed on this Review, I have to be satisfied, on a balance of probabilities, that a new mattress is, in fact, necessary or advisable to contribute to your rehabilitation and is also considered medically required within the meaning of the legislation. In my opinion, that has not been demonstrated.

In your letter in support of your Review, you wrote that you received a mattress funded by Manitoba Public Insurance in 2004. That being the case, the mattress is approximately 11 years old. In [Appellant's general practitioner]'s May 20, 2015 letter, he indicates that you described disrupted sleep "*due to an old and worn out mattress.*" In my opinion, there is no obligation for MPI to fund a recurring expense for a mattress when such an expense is normal in the general population, considering the life expectancy of a mattress. The replacement of your old mattress cannot be considered medically required within the meaning of the *Act* and its Regulations.

Giving consideration to all information on your file, I agree with the case manager's decision and conclude that MPI does not have an obligation to consider funding for a new mattress.

The Appellant disagreed with the decision of the Internal Review Officer and filed an appeal with the Commission on November 4, 2015. That appeal was subsequently withdrawn by the Appellant, by Notice of Withdrawal dated November 13, 2015. Subsequently, in 2017, the Appellant purchased a new mattress with her own funds. She then asked MPIC to reimburse her for that purchase and filed an Application for Review with MPIC, requesting a further review of the Internal Review decision dated October 6, 2015. She included additional medical information with her request. Because new medical information was included with the Appellant's request, MPIC

considered the Appellant's request under subsection 171(1) of the MPIC Act, which provides as follows:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

MPIC considered the Appellant's request. The case manager issued a decision letter dated July 31, 2017, which provides as follows:

... as stated in our decision letter of July 27, 2015, MPI will not consider the cost of reimbursing you for a new mattress. We do understand that a good mattress could be important to a healthy sleep, but we do not have medical information to substantiate a mattress as being medically required in relation to motor vehicle related injuries.

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, and issued an Internal Review decision dated December 7, 2017, which provides as follows:

The additional report provided by [Appellant's psychologist] does not provide any convincing evidence supporting that a new mattress is medically required as it relates to your MVA injuries.

... Your mattress was ... approximately 13 years old when you replaced it. It remains my opinion that MPI is not obligated to fund a recurring expense for a new mattress when such an expense is normal in the general population, considering the life expectancy of a mattress. ...

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission.

Issue:

The issue which requires determination on this appeal is whether reimbursement to the Appellant for the cost of a new mattress would be considered to be medically required.

Decision:

For the reasons set out below, the panel finds that the Appellant has established, on a balance of probabilities, that reimbursement to the Appellant for the cost of a new mattress for her would be considered to be medically required.

Legislation:

The relevant provisions of the MPIC Act are as follows:

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:

...

(d) such other expenses as may be prescribed by regulation.

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.

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 (the “Regulation”) provides, in part, as follows:

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:

...

(d) reimbursement of the victim at the sole discretion of the corporation for

...

(iii) medically required beds, equipment and accessories ...

Evidence and Submission for the Appellant:

The Appellant testified at the appeal hearing, and was also cross-examined by counsel for MPIC.

The Appellant described the many injuries that she suffered in the MVA, including multiple fractures and a traumatic brain injury (“TBI”). On cross-examination, the Appellant said that she continues to suffer the effects of the MVA. She cannot fully turn her neck, she has a height discrepancy in her legs, her hip goes in on the right side, she has pain in her right side when she sleeps, she has bladder problems, and she suffers from chronic pain.

When she saw her doctor, [text deleted], in 2015, she told him that she was continuing to experience pain due to her MVA injuries. He told her that she should get a new mattress, and he wrote a letter to that effect to MPIC, dated May 20, 2015. MPIC denied the funding request, and so she didn’t purchase the mattress at that time.

Sometime around early 2017, [Appellant’s general practitioner] retired, and [Appellant’s general practitioner#2] took over his practice. [Appellant’s general practitioner#2] examined the Appellant and concluded that she had a pinched nerve in her pelvic area. [Appellant’s general practitioner#2]

agreed that the Appellant should get a new mattress. When [Appellant's general practitioner#2] realized that the Appellant had not received funding from MPIC for the mattress, she told the Appellant she should get one right away. That is when the Appellant purchased the mattress, in July of 2017, from Sears, for \$519.79. On cross-examination, the Appellant noted that until she purchased the new mattress, she had been using the mattress that MPIC had funded the purchase of in 2004.

The Appellant thought that [Appellant's general practitioner#2] had also written a letter to MPIC supporting her need for a new mattress, but no such report from [Appellant's general practitioner#2] could be located on the indexed file. [Appellant's general practitioner#2] did write to MPIC in March 2017, supporting the Appellant's medically required purchase of a treadmill following her examination of the Appellant.

Because of her TBI, the Appellant does not take any medication for pain. However, it is necessary for her to have some pain management. [Appellant's general practitioner#2] prescribed acupuncture for her pinched nerve, and MPIC approved the funding for this treatment. The acupuncture is done by a physiotherapist, who said that her pain is chronic, and that nothing could be done about chronic pain. When questioned on cross-examination regarding the physiotherapist's comments, the Appellant responded that she has deep pain, which has been there for 17 years. She testified that the acupuncture treatments have, in fact, helped. MPIC has recently approved 10 more acupuncture treatments.

The Appellant did not buy a box spring, just a mattress. The mattress is a regular mattress, and doesn't raise her head or neck. It is soft and comfortable, and has relieved some of her pain. On cross-examination, the Appellant acknowledged that she always struggles with sleep, but she said

she has been doing a lot better since she bought the mattress, and also since the acupuncture treatments. She further responded that has also always struggled with her finances, but she said that it would help her if she could get reimbursed for the purchase of the mattress. She noted that in the future she may require a bed that would be able to lift up her head, and she does not want to be afraid to ask MPIC to fund that purchase.

People who suffer from a TBI can be affected differently. The Appellant is not able to work for pay, although she does do volunteer work. She said that she finds communicating difficult. She doesn't take any medication for depression, but she does have regular sessions with her psychologist, [text deleted]. She benefits from her treatments with [Appellant's psychologist] and, in fact, planned to see her right after the hearing.

She requires a good night's sleep for good physical and mental health. Rest is important for her cognitively. She benefits from a good rest. She asked everyone on her team, her doctor and her psychologist, if a mattress would help and they all said that it would.

The Appellant pointed out that she broke her neck and her pelvis. She needs to sleep for 12 hours on a mattress that won't cause her pain. [Appellant's psychologist] wrote a letter to MPIC dated June 13, 2017, supporting that she needs a good night's sleep; it is important to her emotional stability. Undisturbed rest is important not only physically for her but also mentally. Her brain injury is traumatic and she tries to lessen the impact of it. She works hard for optimal health and she noted that a comfortable mattress has helped her achieve that. Therefore, the purchase of the mattress is medically required for her.

In reply to the submission from MPIC, the Appellant addressed the cases referred to by counsel for MPIC, and said that they did not apply to her situation. With respect to AC-06-033, she noted that that case dealt with a particular type of mattress. The Appellant said that she wasn't focused on the particular type of mattress; rather, she was focused on her health. With respect to AC-08-52, the Appellant noted that her injuries were more severe than the injuries in that case.

Submission for MPIC:

Counsel for MPIC provided a written submission, which was appreciated, along with making an oral argument. Counsel noted that the issue in this appeal is whether reimbursement for a new mattress would be considered medically required as it relates to the injuries sustained by the Appellant in the MVA. Counsel reviewed the relevant sections of the MPIC Act. She also reviewed the letters from the Appellant's physicians referred to above, one from [Appellant's general practitioner] regarding the purchase of the mattress dated May 20, 2015, and another from [Appellant's psychologist] regarding the Appellant's sleep management dated June 13, 2017. Counsel also pointed out a file note dated October 30, 2017, in which the case manager made note of a conversation with [Appellant's psychologist], in which [Appellant's psychologist] advised that the Appellant "struggles with finances and sleep".

It is MPIC's position that a new mattress is not medically required for the Appellant within the meaning of the legislation. Counsel argued that [Appellant's general practitioner] did not connect the purchase of the mattress to the healing or recovery of the Appellant's MVA injuries, and that no medical evidence was submitted that provides a rationale for how the new mattress would assist in the Appellant's sleep cycles or how it would impact her pelvic or femur injuries. Counsel pointed out that [Appellant's general practitioner]'s letter came in 2015, at approximately 13 years

after the MVA, at a time when the Appellant would have reached maximum medical improvement in relation to her injuries.

Counsel acknowledged that [text deleted], the Appellant's treating psychologist, advised that the Appellant is more emotionally dysregulated when she is not sleeping properly. She argued, however, that [Appellant's psychologist]'s report does not indicate how a new mattress would help the Appellant to sleep better, or how sleeping better might impact her emotional well-being. She also pointed out that no medical documentation has been provided to MPIC that would indicate that the Appellant's emotional issues have improved since obtaining the new mattress. Counsel pointed to the file note dated October 30, 2017, three months after the purchase of a new mattress, in which it is recorded that [Appellant's psychologist] mentioned to the case manager that the Appellant struggles with sleep.

It is MPIC's position that the Appellant has fallen short of the onus of proving, on a balance of probabilities, that the mattress has had any tangible positive effect on her emotional well-being, and counsel therefore submitted that the purchase of a new mattress was not medically required to treat the Appellant's psychological issues.

Counsel referred the panel to two previous cases of the Commission which, she argued, supported MPIC's position. In the first case, AC-06-033, the Commission found that the appellant in that case had not established that the mattress was medically required: "Although [Appellant's Doctor] advised that the mattress might facilitate a proper sleep position and improve the Appellant's functional status, this did not render the mattress a medical necessity." The Commission came to a similar conclusion in the second case referred to by counsel, AC-08-52. Counsel acknowledged that sleep is important and that getting a good night's sleep is beneficial, but submitted that being

beneficial does not rise to the level of being medically required. In response to a question from the panel, counsel submitted that medical practitioners are in the best position to determine what is medically required.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that she should be entitled to reimbursement from MPIC for the cost of the mattress. In particular, pursuant to the relevant legislation, the Appellant needs to show that, on a balance of probabilities, a new mattress is medically required.

It should be noted that reimbursement under the Regulation is at the discretion of MPIC. However, under subsection 184(1) of the MPIC Act, the Commission, after conducting a hearing, can make any decision that MPIC could have made. Therefore, the Commission has the ability to exercise the discretion to authorise reimbursement to the Appellant.

In making our decision, as set out below, the panel has carefully reviewed all of the documentary evidence filed in connection with this appeal. We have given careful consideration to the testimony of the Appellant and to the submissions of the Appellant and of counsel for MPIC. We have also taken into account the provisions of the relevant legislation and the applicable case law.

As noted above, the Appellant's physician [Appellant's general practitioner] wrote to MPIC on May 20, 2015, to request that MPIC fund the purchase of a new mattress for the Appellant, as follows:

The above named sustained severe pelvic and femur injuries which will never heal completely. She describes disrupted sleep due to an old and worn out mattress. She would benefit from acquiring a new mattress for her previous injuries.

This letter references the Appellant's MVA-related physical injuries. As noted earlier in these Reasons, the Appellant suffered severe physical injuries in the MVA, entitling her to permanent impairment benefits under the MPIC Act in the amount of 84.4% of the maximum entitlement. She gave evidence that she continues to suffer from many of these injuries, which have left her with chronic pain. [Appellant's general practitioner#2], who took over [Appellant's general practitioner]'s practice, wrote to MPIC on March 27, 2017, noting that the Appellant "is limited to certain activities (one being walking) in order to preserve her physical strength and keep her pain at bay".

The Appellant also suffered significant MVA-related psychological injuries, due to the TBI that she suffered in the MVA. [Text deleted], a neuropsychologist, conducted a neuropsychological consultation of the Appellant in September 2009. She provided a report to MPIC on October 20, 2009, in which she stated as follows:

It is my opinion that, on the balance of probabilities, [the Appellant]'s identified frontal brain injury and associated cognitive deficits (including issues with cognitive impulsivity, difficulties with cognitive abstraction and her resulting tendency to be concrete in her thinking, difficulties with cognitive rigidity and perseveration, and mild difficulties with the efficient encoding of verbal memory), are causally related to the injuries she sustained in the MVA. ...

...

While there is evidence to suggest that [the Appellant] likely exhibited some maladaptive personality traits prior to the MVA ... there is also evidence to suggest that, on the balance of probabilities, [the Appellant] is exhibiting some additional difficulties relating to a frontal brain injury incurred as a result of the MVA. From the collateral information gathered by both [Appellant's neuropsychologist#2] and [Appellant's neuropsychologist#3], those who knew [the Appellant] prior to the MVA have reported that she is more impulsive and emotionally volatile than she had been before. ... There is therefore, evidence to suggest that, on the balance of probabilities, that her current presentation is likely a combination of some possible pre-existing psychological and personality issues, organic effects of a frontal brain injury, and the sequelae in terms of missed life experiences which have occurred as a result of her ongoing disability status.

MPIC's case manager reviewed [Appellant's neuropsychologist]'s report with [text deleted], a psychologist with MPIC's Health Care Services team, on November 24, 2009. [MPIC's psychologist] confirmed by email dated December 1, 2009, that, as recorded in the case manager's email detailing their discussion, he agreed with [Appellant's neuropsychologist]'s opinions as set out above and that her findings were consistent with earlier reports from both [Appellant's neuropsychologist#2] and [Appellant's neuropsychologist#3], both of whom had conducted prior neuropsychological assessments of the Appellant.

MPIC approved funding for psychological treatment for the Appellant. [Text deleted] has been her treating psychologist since December 2, 2015. In a Psychological Progress Report dated April 11, 2017, [Appellant's psychologist] responded yes when answering both of the following questions:

1. would the claimant's current psychological condition result in an inability to perform required tasks; and
2. would the claimant's current psychological condition pose a safety/health risk to herself/coworkers/others.

In elaborating on those responses, [Appellant's psychologist] wrote: "Strong emotional lability. Can be very reactive to others. Difficulty sustaining effort. Needs routine, especially with regards to sleep."

MPIC's Health Care Services psychological consultant reviewed this report, and provided a report dated April 28, 2017, which stated as follows:

... [Appellant's psychologist] indicates that the claimant does continue to have functional impairment and emotional dysregulation related to her MVA related brain injury.... As such, a further 8 sessions should be approved ...

As referred to above, [Appellant's psychologist] provided a further report to MPIC dated June 13, 2017, which stated as follows:

[The Appellant] asked me to comment on her sleep management, given that I have worked with her in my capacity as a Registered Psychologist since December 2015.

[The Appellant] is more emotionally dysregulated when she is not sleeping regularly. To her credit, she actively manages this, prioritizing healthy sleep routines (e.g., keeping regular sleep hours).

It is shortly after the date of this report, in July 2017, that the Appellant purchased a new mattress. Her evidence is that her sleep is better with the new mattress, and that she is “doing a lot better”. Subsequent to this, MPIC’s case manager recorded a conversation with [Appellant’s psychologist] on October 30, 2017, in which [Appellant’s psychologist] told her that the Appellant “struggles with finances and sleep”. When questioned about this, the Appellant testified that she always struggles with sleep, but as noted, she has been doing better since the purchase of the new mattress. She said that she works hard for optimal health and that a comfortable mattress has helped her achieve that.

The Appellant’s treating physician, [text deleted], in his letter of May 20, 2015, noted that the Appellant’s mattress was in need of replacement. He pointed out that she suffered from permanent injuries and disrupted sleep due to her MVA-related physical injuries. The panel has also taken particular note that the Appellant’s psychological injuries have had a significant impact on her well-being. For example, she testified that she is not able to work for pay. MPIC has accepted that the Appellant’s psychological condition was caused by the MVA, and MPIC provides funding for the Appellant’s treatment with [Appellant’s psychologist] to deal with the Appellant’s emotional dysregulation.

[Appellant’s psychologist] has been treating the Appellant since December 2015, in respect of her MVA-related psychological issues arising from her TBI. In her reports dated April 11, 2017 and June 13, 2017, [Appellant’s psychologist] identified that the Appellant requires “routine,

especially with regards to sleep”, and that the Appellant is “more emotionally dysregulated when she is not sleeping regularly”. The Appellant confirmed this in her testimony; she said that she needs to sleep for 12 hours, and that rest is important to her cognitively. She said further that she is doing better since the purchase of the new mattress. The Appellant’s requirement for a full night’s sleep goes beyond merely being beneficial for her; we find that it is necessary for her emotional regulation.

Based on the opinions of [Appellant’s general practitioner] and [Appellant’s psychologist], as well as on the Appellant’s evidence, the Commission finds that Appellant has met the onus of establishing, on a balance of probabilities, that reimbursement to the Appellant for the cost of a new mattress would be considered to be medically required.

Disposition:

Accordingly, the Appellant’s appeal is allowed and the Internal Review decision dated December 7, 2017, is therefore rescinded.

The Appellant shall therefore be entitled to reimbursement for the cost of the mattress that she purchased on July 19, 2017.

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

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 Winnipeg this 27th day of February, 2019.

JACQUELINE FREEDMAN

SHARON MACDONALD

LORNA TURNBULL