Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-132

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Dr. Patrick Doyle** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf, together with his wife, [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**January 5, 2005**
ISSUE(S):	**1. Whether the Appellant is entitled to reimbursement for main level flooring;** **2. Whether the Appellant is entitled to labour costs associated with landscaping and fencing at his residence;** **3. Whether the Appellant is entitled to coverage for certain home modifications, including: Gym and two-piece bathroom in the basement area;** **4. Whether the Appellant is entitled to reimbursement for the purchase of a Bowflex Versatrainer Home Gym;** **5. Whether the Appellant is entitled to coverage for certain home modifications, including: garage portion;** **6. Whether the Appellant is entitled to reimbursement for the cost of an all terrain vehicle.**
RELEVANT SECTIONS:	**Sections 138 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 10(1)(b)(iii) of Manitoba Regulation 40/94 (hereinafter referred to as "Section 10(1)(b)(iii)") and Section 10(1)(d)(ii) 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

On January 3, 2003 the Appellant was involved in a motor vehicle accident and as a result he suffered a bi-lateral open complex fracture of both femurs and underwent a bi-lateral above the knee amputation. In addition, the Appellant suffered a cognitive disorder resulting from a concussion.

At the time of the accident the Appellant was approximately [text deleted] years of age, married and was residing with his wife in their own home, which was not wheelchair accessible. Following an assessment by MPIC's consultant, [text deleted], it was recommended that for cost efficiency purposes the Appellant construct a new home rather than renovate his existing home. The Commission notes that MPIC made a significant contribution to the cost of the construction of the Appellant's home in order to ensure the new home was accessible for the Appellant. However, a dispute arose between the Appellant and MPIC in respect of MPIC's obligation to reimburse the Appellant in respect of the following matters:

1. Labour costs associated with landscaping and fencing;
2. Reimbursement for the cost of an all terrain vehicle;
3. Coverage for home modifications including:
    a. Gym and two-piece bathroom in the basement area;
    b. Garage;
    c. Main level flooring.
4. Coverage for the purchase of a Bowflex Versatrainer Home Gym.

The case manager rejected the Appellant's request for reimbursement in respect of the above matters and, as a result, the Appellant made an Application for Review by an Internal Review Officer. The Internal Review Officer in several decisions dated August 21, 2003, February 18, 2004 and February 23, 2004, rejected the Appellant's request for reimbursement in respect of the above matters and, as a result, the Appellant filed an appeal with this Commission.

Appeal

The appeal hearing took place on January 5, 2005. The Appellant attended the hearing together with his wife, [text deleted]. Mr. Mark O'Neill represented MPIC.

1. The Appellant's entitlement to reimbursement for main level flooring

The relevant provisions of the MPIC Act and Regulations in respect of this matter are set out in Section 138 of the MPIC Act and Section 10(1)(b)(iii).

Section 138 of the MPIC Act states:

> **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.

Section 10(1)(b)(iii) of Manitoba Regulation 40/94 states:

> **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:
> . . . .
> (b) funds for an extraordinary cost required
> . . . .
> (iii) to alter the plans for or construction of a residence to be built for the victim;

The Appellant, in his submission to the Commission, argued that:

1. as a result of his employment he was required to move his family to a number of different locations in Canada;
2. upon his retirement he and his wife decided that their [text deleted] home, which they were residing in at the time of the motor vehicle accident, would be their permanent residence;
3. as a result of the motor vehicle accident he was forced to sell their home and to construct a new home to accommodate the disabilities he suffered as a result of the motor vehicle accident.
4. the home that he and his wife resided in at the time of the motor vehicle accident had hardwood floors and in order to maintain the same standard of flooring installed hardwood flooring in their new home at a total cost of $14,000.
5. MPIC had provided an allowance in respect of the flooring in the amount of $4,908.70 but rejected payment of the balance in the amount of $9,091.30.
6. the motor vehicle accident was not caused by him and he and his family were forced to move to a new home as a result of the injuries he sustained in the motor vehicle accident.
7. in these circumstances MPIC had an obligation to reimburse him for the entire cost of the hardwood flooring rather than for a portion thereof.

In reply, MPIC's legal counsel submitted that the decision of the Internal Review Officer rejecting the Appellant's request for reimbursement of $9,091.22 was correct and in compliance with Section 10(1)(b)(iii) and, as a result, he requested that the Commission dismiss the Appellant's appeal in this respect.

Discussion

The Commission agrees with the decision of the Internal Review Officer to reject the Appellant's Application for Review for reimbursement in the sum of $9,091.30. The Commission notes that the Internal Review Officer in his decision stated that the case manager, in rejecting the Appellant's request for reimbursement in her letter dated November 5, 2003, recognized that the Appellant's previous home had existing flooring and that the case manager had attempted to isolate the additional "extraordinary" flooring costs brought about by the effect of the motor vehicle accident injuries sustained by the Appellant. In his decision dated February 23, 2004 the Internal Review Officer, after referring to Section 10(1)(b)(iii) stated:

> In order to qualify for reimbursement, it has to be established that the expenses being claimed are for extraordinary costs. Although "extraordinary" is not defined in the Act or Regulations, the definition of Black's Law Dictionary (6th Edition) is as follows:
>
> > "**Extraordinary**.
> > Out of the ordinary; exceeding the usual, average, or normal measure or degree; beyond or out of the common order, method, or rule; not usual, regular, or of a customary kind; remarkable; uncommon; rare; employed for an exceptional purpose or on a special occasion."
>
> As a result of a lengthy and often complex progress (sic) involving you and your wife, your caregivers, [MPIC's consultant] and the Case Manager, the Corporation has determined whether certain expenses being claimed are necessary or advisable and/or extraordinary under the circumstances. Having reviewed the above, I am unable to conclude that the Case Manager's decision was incorrect as it relates to the items which are the subject of this Internal Review Application.

MPIC's legal counsel submitted to the Commission that:

1. MPIC's obligation under Section 10(1)(b)(iii) does not obligate MPIC to construct a residence for the Appellant and pay all of the costs associated with that construction.
2. MPIC's obligation under the regulation is to pay only the expenses claimed by the Appellant which are necessary or advisable and/or extraordinary in respect of the construction of the residence in order to accommodate the motor vehicle accident

injuries sustained by the Appellant.

3. MPIC met its obligation to the Appellant by the payment of the sum of $4,908.70, which sum represented the extraordinary costs of the hardwood flooring within the meaning of Section 138 of the MPIC Act and Section 10(1)(b)(iii).

The Commission agrees with MPIC's legal submission in respect of the meaning of Section 10(1)(b)(iii). The Commission therefore determines that:

1. the Appellant has failed to establish, on a balance of probabilities, that the extra flooring costs claimed by the Appellant in the amount of $9,091.30 constitutes an extraordinary cost within the meaning of Section 10(1)(b)(iii).
2. the payment by MPIC to the Appellant of the sum of $4,908.70 satisfied MPIC's obligation to the Appellant pursuant to Section 10(1)(b)(iii) in respect of the cost of installing the main level flooring.

The Commission therefore confirms the decision of the Internal Review Officer dated February 23, 2004 in respect of this appeal, rejects the Appellant's request for reimbursement of the sum of $9,091.30 and, as a result, dismisses the Appellant's appeal.

2. Whether the Appellant is entitled to labour costs associated with landscaping and fencing at his residence

As indicated previously in this decision, the Appellant, as a result of the serious motor vehicle accident injuries sustained on January 3, 2003, decided to relocate his home in order to accommodate his physical disabilities. At the time of the accident the Appellant was residing at a home in [text deleted] which was fully landscaped and fenced.

Internal Review Officer's Decision

The Appellant's request for reimbursement of the cost of landscaping and fencing of the new home was rejected by the case manager and as a result the Appellant filed an Application for Review wherein he stated:

- Historically, I have always installed any landscaping. This includes building and erecting required fences, decks, retaining walls etc.
- In my current and future condition, I am incapable of doing any of this due to this "accident". Therefore I request this decision be reconsidered, including fencing, for the costs associated or at the very least, labour costs to be incurred in these projects for the replacement property, as prior to the accident, I had no intention of relocating and therefore had never budgeted for these additional costs. These are not my fault!

The Internal Review Officer wrote to the Appellant by letter dated August 21, 2003 and indicated that he was rejecting the Appellant's Application for Review and confirming the case manager's decision.

In his reasons for dismissing the Application for Review the Internal Review Officer applied the same reasoning as he applied in rejecting the Appellant's request for the cost of reimbursement of the main level flooring of the new home. The Internal Review Officer referred to Section 10(1)(b)(iii) and the definition of "extraordinary" as set out in Black's Law Dictionary and stated:

> I am unable to conclude on the facts presented that the costs associated with the building of a fence and landscaping are extraordinary. The landscaping you are seeking to be reimbursed for includes costs associated with sod, top soil and the planting of trees. The legislation clearly requires that the expense must be an extraordinary cost before reimbursement can be considered. Essentially you are claiming for costs associated with the installation of the landscaping and/or fencing to replace the landscaping and fencing which you had at your previous residence. In my view, this cannot be construed to be an extraordinary cost by reason thereby.

At the appeal hearing the Appellant asserted the same submission that he had asserted in his Application for Review. In reply, MPIC's legal counsel asserted that the Internal Review

Officer's decision was correct and that the Appellant's appeal should be dismissed.

The Commission in its decision [text deleted] (AC-01-125) dealt with an appeal which related to the issue as to whether or not the land surrounding the Appellant's home was included in the definition of "residence" in Section 10(1)(b)(iii). The Commission concluded that a residence included not only the physical structure of the residence, but the land which surrounded the physical structure within the boundaries of the Appellant's residential property lot. In that case, MPIC did not raise the issue that the construction costs of landscaping and fencing were not extraordinary costs within the meaning of Section 10(1)(b)(iii). As a result, the Commission did not determine that issue in the [text deleted] (AC-01-125) decision.

However, in this appeal MPIC has submitted that the construction costs of landscaping and fencing were not an extraordinary cost within the meaning of Section 10(1)(b)(iii). The Commission therefore finds that the legal issues determined in W.P. (AC-01-125) are different than the legal issues raised in this appeal and, as a result, the Commission's decision in [text deleted] (AC-01-125) has no application that the Commission is required to determine in this case.

The Commission agrees with MPIC's legal counsel that MPIC's obligation under Section 10(1)(b)(iii) does not obligate MPIC to pay for the construction costs in respect of landscaping and fencing on the Appellant's property but only the extraordinary costs within the meaning of this Regulation. The Commission further agrees with the Internal Review Officer's decision that the cost of the construction of the landscaping and fencing on the Appellant's property does not constitute an extraordinary cost within the meaning of Section 10(1)(b)(iii). For these reasons, the Internal Review Officer's decision dated August 21, 2003 is confirmed and the appeal in

respect of this issue is dismissed.

3. **Whether the Appellant is entitled to coverage for certain home modifications, <u>including: Gym and Two-piece bathroom in the basement area</u>**

<u>Gym</u>

The Commission notes that MPIC recognized that the Appellant required exercise equipment in order to ensure maintenance, strength and endurance of his upper body. As a result, MPIC agreed to reimburse the Appellant for the purchase of a mat, bicycle, free weights as well as mirrors. MPIC also recognized that the home built by the Appellant did not have sufficient room on the main floor to accommodate the home exercise equipment.

In his decision dated February 23, 2004, the Internal Review Officer referred to two memorandums prepared by the case manager, [text deleted], and stated:

> On August 11, 2003 [Appellant's case manager] attended at your home and made the following notes with respect to the gym:
>
> > "I also took photos of the Gym with mirrors on one wall. The gym is in the basement since there wasn't enough room in the main floor rooms for the requirement exercise equipment that [the Appellant] will need. (re: e-mail from OT [text deleted] of July 31, 2003)."
>
> I have noted the reports and memoranda related to the home exercise equipment issue. In [Appellant's case manager]'s memorandum to [text deleted] of August 19, 2003, she indicated the following:
>
> > "I spoke to [Appellant's occupational therapist] with regard to [the Appellant's] Gym and why it isn't in (sic) the main floor. There isn't room on the main floor for the equipment he needs. The two extra bedrooms on the main floor are being used [Appellant's wife's] home office and the other for a computer/den/photography for [the Appellant]. The area in the basement makes a whole lot more sense and will be able to accommodate his wheelchair treadmill as well as his other equipment."

The Appellant requested that he be reimbursed for an area in the basement for the cost of

construction of a fitness area and for the cost of installing a two-piece bathroom. MPIC rejected this claim and the Internal Review Officer, in his decision dated February 23, 2004, stated:

> The basis for the denial of this claim is that you had some basement development in your previous home and that it is not an extraordinary expense considered necessary or advisable for your rehabilitation.

The Appellant appealed this decision to the Commission.

Appeal

The relevant provisions of the Act and Regulation in respect of this appeal is:

Section 138 of the MPIC Act, which states:

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.

Section 10(1)(b)(iii) of Manitoba Regulation 40/94, which states:

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:

. . . .

(b) funds for an extraordinary cost required

. . . .

(iii) to alter the plans for or construction of a residence to be built for the victim;

The Internal Review Officer commented in respect of Section 10(1)(b)(iii) as follows:

> In order to qualify for reimbursement, it has to be established that the expenses being claimed are for extraordinary costs. Although "extraordinary" is not defined in the Act or Regulations, the definition of Black's Law Dictionary (6th Edition) is as follows:
>
> > **"Extraordinary.**
> > Out of the ordinary; exceeding the usual, average, or normal measure or degree; beyond or out of the common order, method, or rule; not usual,

> regular, or of a customary kind; remarkable; uncommon; rare; employed for an exceptional purpose or on a special occasion."

The Commission finds that:

1. since it was necessary for the Appellant to exercise in order to rehabilitate himself by maintaining the endurance and strength of his upper body, a fitness area to accommodate his exercise equipment was required to be built in the basement area.
2. the cost of the construction of the fitness area in the Appellant's basement is an extraordinary cost within the meaning of Section 10(1)(b)(iii) since it is not an ordinary or common cost in the construction of a home.
3. as a result, MPIC is required to reimburse the Appellant for such costs pursuant to Section 10(1)(b)(iii).
4. such costs in the construction of an appropriate fitness area would include the cost of partitions, flooring, electrical, heating, fixtures and a finished ceiling.

The Commission therefore rescinds the Internal Review Officer's decision dated February 23, 2004 in this respect and directs that MPIC reimburse the Appellant for the cost of providing a finished area for a gym in the basement area.

Two-piece Bathroom

The Commission notes that the Internal Review Officer in his decision dated February 23, 2004 did not address the Appellant's request for a two-piece bathroom.

The Appellant testified at the appeal hearing and stated:

1. when he is exercising in the basement there is a need from time to time for him to use the washroom and on occasion that need is immediate;

2. when he is exercising on a lower level it takes approximately 4 to 5 minutes for him to travel by lift from the basement area to the main floor in order that he may attend at the washroom;
3. in many instances he would be unable to successfully use the bathroom facilities on the main floor if he was required to use a lift.
4. it was for this reason that he required a bathroom facility to be located in the basement area.

The Commission finds that:

1. the Appellant is a credible witness and accepts his testimony in respect of his need to have a two-piece bathroom in the basement area.
2. it is necessary for the Appellant, when exercising in the fitness area, to have reasonably quick access to a bathroom facility in this area.
3. the bathroom facility should provide for privacy when the Appellant uses this facility in the basement area.
4. in the circumstances, the cost of the construction of a two-piece bathroom in the basement area (which cost would include partitions, flooring, electrical, heating, fixtures and a finished ceiling) constitutes an extraordinary cost within the meaning of Section 10(1)(b)(iii).

The Commission finds that for these reasons MPIC is required, pursuant to Section 10(1)(b)(iii) to reimburse the Appellant for the cost of the construction of a two-piece bathroom facility in the basement area. As a result, the Internal Review Officer's decision dated February 23, 2004 is rescinded and the Appellant's appeal is allowed in this respect.

4. The Appellant's entitlement to reimbursement for the purchase of a Bowflex Versatrainer Home Gym

On December 1, 2003 the Appellant had made a request to MPIC that they purchase a Bowflex Versatrainer Home Gym ('Bowflex') for his use in his home.

The case manager wrote to the Appellant on December 17, 2003 and rejected the Appellant's request that MPIC purchase a Bowflex for the following reasons:

1. MPIC's Health Care Services Team had determined that the Bowflex was not medically required and not a standard recommendation for individuals who suffer lower limb amputations.
2. there were no provisions under Manitoba Regulation 40/94 which would permit MPIC to purchase exercise equipment such as a Bowflex.

An Internal Review hearing was held on January 7, 2004 in respect of the case manager's decision dated December 17, 2003 in respect of Bowflex. The Internal Review Officer, in a decision dated February 18, 2004, confirmed the case manager's decision of December 17, 2003 and rejected the Appellant's request that MPIC purchase the Bowflex for his use in his home.

Is the Bowflex medically required?

In arriving at this decision the Internal Review Officer relied on the reports by MPIC's Medical Consultant, [text deleted], a Physical Rehabilitation Specialist, who had considered this matter in two Inter-Departmental Memorandums of July 30, 2003 and November 14, 2003. The Internal Review Officer in his decision stated:

> [MPIC's doctor] whet (sic) on to indicate that in his opinion, simple free weights would be reasonable for your rehabilitation by maintaining an increase in upper

> body strength. He also indicated that your cardiovascular activity could be accomplished with the use of a hand powered bicycle including the stationary training unit referred to in the Case Manager's referring memo.
>
> In a subsequent Inter-Departmental Memorandum of November 14, 2003, [MPIC's doctor] went on specifically consider the request for a Bowflex. Referring to his earlier memorandum, [MPIC's doctor] indicated that the Bowflex fell under a category of "stationary strength training equipment" which he had indicated would not be considered a medical necessity. In his latter Inter-Departmental Memorandum, [MPIC's doctor] stated:
>
> > "In my opinion, if [the Appellant] were to pursue a home exercise program, including resistance training, this type of equipment would seem to be reasonable. However, that type of equipment is a personal preference of an individual and would not be considered medically required. Also, as indicated in my previous review, any home exercise equipment would need to be used with caution due to balance issues and decreased circulatory volume resulting from the absence of the lower limbs."
>
> With respect to the issue of home exercise equipment, the Corporation did provide reimbursement for the cost of a set of dumbbells, a dumbbell rack, a wall bar, mirrors and a training bicycle which can be used outside and inside on a treadmill.
>
> Based upon the equipment purchased by the Corporation and the opinions expressed by [MPIC's doctor], 1 am unable to conclude that it has been established that the acquisition of a Bowflex Versatrainer is a medical necessity on account of the injuries you sustained in the motor vehicle accident. Accordingly, I am upholding [Appellant's case manager's] decision of December 17, 2003 and dismissing your Application for Review on this issue.

The Appellant's physiotherapist, [text deleted], in a report to the case manager dated June 12, 2003 asserted that the Appellant required extremely strong arms as well as a great cardio-vascular endurance in order to walk with two (2) above knee amputations. [Appellant's physiotherapist] stated that "*This is a task that many individuals would not be able to accomplish. It really depends on how strong they are and how good there(sic) endurance is.*"

[Appellant's physiotherapist] described the importance of endurance and walking with two (2) above knee amputations as follows:

> According to Lusardi and Nielsen, 2000, an individual with a trans-femoral amputation (Above the knee), has an energy cost during walking of between 60% and 110%. This means that every step that individual takes will require almost 2 times the normal amount of energy. While this sounds like a big difference, it becomes much more when we speak of someone that has 2 prosthetic legs at this level. Normally when an individual is learning to walk with one prosthetic leg, they have to concentrate on not letting the prosthetic knee joint buckle during the stance phase and not letting the prosthetic foot drag during the swing phase. In [the Appellant's] case, while he is concentrating on not letting on (sic) leg buckle, he needs to simultaneously concentrate on not letting the other foot drag, and vice versa. So you can see that the energy cost for [the Appellant] would be much more than the number above. Though I cannot give any actual numbers from the literature, it would be fair to say that it would require more than twice that amount, and it wouldn't surprise me if the number were as high as 3 or 4 times the energy costs for a normal individual.

In respect of upper body strength [Appellant's physiotherapist] stated:

> The reason [the Appellant's] upper body strength needs to be exceptional is because he will be relying on walkers, crutches, or canes for quite a while during his rehab process, if not forever. His shoulder depressors, shoulder retractors, shoulder extensors, and elbow extensors in particular need to be as strong as they possibly can. In order for [the Appellant] to be able to increase his strength and endurance, and more importantly at this point, to maintain it there for as long as possible, he will need certain pieces of exercise equipment suitable for someone in a wheelchair.

[Appellant's physiotherapist] further stated that after reviewing some wheelchair accessible home gyms he concluded that the Bowflex would allow the Appellant to do most of the exercise he is required to do at the cheapest price. He further stated:

> . . . It is imperative that he is on a daily strength program for his upper body if he is to learn to walk efficiently with his two prostheses.

The Internal Review Officer in his decision dated February 18, 2004, relied on the medical opinion of [MPIC's doctor] as set out in his Inter-Departmental Memorandum dated July 30, 2003, rejected the recommendation of the physiotherapist and concluded that simple free weights would be reasonable equipment in order to permit the Appellant to carry out the necessary exercises he was required to perform.

On October 3, 2003 [Appellant's physiotherapist] wrote again to the case manager in respect of the reasons why the Appellant would benefit from the Bowflex and stated "*Other home gyms would suffice but are not wheelchair accessible, have less exercise options, and are more expensive.* " and then described in some detail why the Bowflex was superior to free weights.

In this letter [Appellant's physiotherapist] proceeds to set out in some detail the benefits of a Bowflex over the use of free weights in respect of an exercise program for the Appellant and states:

1. With free weights the Appellant would be limited to the number of upper body exercises he could do simply because of the lack of body weight in his lower extremities. With the Bowflex the Appellant would be strapped into the wheelchair which would be locked into the machine, thus not needing to rely on body weight to counteract the actual weight he is using.
2. There are over thirty (30) exercises on the Bowflex which the Appellant could take advantage of. With free weights the Appellant would need to constantly change the amount of plates on the dumbbell since every exercise that he does requires a different amount of resistance. Therefore, the use of free weights, [Appellant's physiotherapist] states, would be both inconvenient and time consuming.
3. Part of the Appellant's program is to incorporate circuit training into his workouts so as to work on his endurance. Circuit training means to work out with weights but to rest as little as possible in between each set and each exercise. With free weights the Appellant would require ten (10) pairs of dumbbells and this would not be 100% safe. However, with the Bowflex the Appellant would have as much weight as he needed at his disposal without actually having to take time to change the resistance and it would be 100% safe.

[Appellant's physiotherapist] further states:

> As you can see, free weight would definitely allow [the Appellant] to workout but has many disadvantages compared to a Universal Gym. And as far as Universal Gyms go, the Bowflex appears to be the most useful in this case considering that you can get it wheelchair accessible.

[MPIC's doctor] was requested by the case manager to review the medical information on the Appellant's file and to comment on the medical necessity of home exercise equipment. As indicated in the Internal Review Officer's decision, which is referred to above, [MPIC's doctor] stated that in his view the Bowflex was not a medical necessity.

Appeal

At the appeal hearing the Appellant filed a letter dated October 20, 2004 from [Amputee Program Intake Coordinator] to the Appellant's case manager. [Amputee Program Intake Coordinator] [text deleted] stated:

> [The Appellant] has been progressing extremely well with his prosthetic training in physiotherapy. Now with the addition of C-legs for ambulation he will continue to improve beyond the limits that had been imposed by his previous MAUCH knee units. I would like to reiterate that [the Appellant] continues to demonstrate an incredible level of determination and perseverance to achieve this level of outcome.
>
> [The Appellant] will be discharged likely by the end of this year. I would like to ensure that [the Appellant] would have every advantage available to him to ensure he retains the functionality that he has achieved here in physiotherapy. My concern is that [the Appellant] will not have access to equipment that will allow him to maintain his strength and cardiovascular conditioning. As previously stated, ambulation with bilateral above knee prostheses places significantly greater energy demands upon an individual when compared to able-bodied persons. [The Appellant] will need to maintain a standard of both strength and cardiovascular conditioning in order to continue ambulation over the long term.
>
> A Bowflex Versatrainer home gym would enable [the Appellant] to easily access both strength and cardiovascular exercises from a wheel chair. The versatility of this machine will allow [the Appellant] to strengthen both his upper body as well as allow him to attach resistance to his stumps to continue strengthening his hips. The Bowflex could also

> be used as a cardiovascular training device when used for rowing with light resistance or when used during circuit training.
>
> I would again like to stress that this request is motivated by the desire to allow [the Appellant] to continue his present level of functioning for as long as possible.

The Commission notes that there is no dispute between the Appellant and MPIC that it is medically necessary for the Appellant to have exercise equipment for the purposes of his rehabilitation. MPIC, in adopting [MPIC's doctor's] advice, reimbursed the Appellant for the cost of free weights in order to assist the Appellant in maintaining his upper body strength and endurance and had rejected the Bowflex as not being medically necessary in the circumstances. On the other hand, the Appellant is supported by both [Appellant's physiotherapist], and [Amputee Program Intake Coordinator] of the [text deleted] in respect of the need for a Bowflex. The dispute between the parties therefore relates to the kind of exercise equipment that is medically necessary for the Appellant.

At the appeal hearing the Appellant testified that the Bowflex would permit him not only to strengthen his upper body but would permit him to strengthen his hips. He further testified that free weights would not permit him to provide any exercise to strengthen his hips.

The Commission notes that [MPIC's doctor] did not respond to the criticism of [Appellant's physiotherapist], as to the deficiencies of the free weights, nor did [MPIC's doctor] provide any reasons to establish that the Bowflex was not medically necessary for the Appellant's rehabilitation.

The Commission further notes that [Amputee Program Intake Coordinator], in his letter dated October 20, 2004, addressed the issue of the importance of the Appellant strengthening his hips

and he corroborated the Appellant's testimony in this respect. [MPIC's doctor] in his Inter-Departmental Memorandum, does not address the issue as to whether or not it was important for the Appellant to strengthen his hips nor did he comment on the ability or inability of free weights to strengthen the Appellant's hips.

The Commission, for these reasons, accepts the opinions of [Amputee Program Intake Coordinator], [Appellant's physiotherapist] and the testimony of the Appellant in respect to the issue relating to the importance of the Bowflex in assisting the Appellant's rehabilitation, and rejects the medical opinion of [MPIC's doctor] in this respect. The Commission therefore finds that the Internal Review Officer erred in his decision dated February 18, 2004 in concluding that the Bowflex was not medically necessary for the purposes of rehabilitating the Appellant. The Commission is satisfied that the Appellant has established, on the balance of probabilities, that the Bowflex was medically required in order to permit the Appellant to maintain his upper body strength and endurance and to strengthen his hips.

The Commission therefore rescinds the Internal Review Officer's decision dated February 18, 2004 in rejecting the obligation of MPIC to reimburse the Appellant for the cost of the Bowflex.

Application of Section 138 of the MPIC Act

The case manager in his letter to the Appellant dated December 17, 2003 indicated that the second reason for rejecting the Appellant's request for the Bowflex was that under Manitoba Regulation 40/94 there were no provisions for the purchase of exercise equipment such as the Bowflex. The Commission agrees with the case manager that there are no provisions under Manitoba Regulation 40/94 for the purchase of any exercise equipment, whether it is a Bowflex or free weights. An examination of Section 10(1) of Manitoba Regulation 40/94, which

specifically deals with rehabilitation expenses, is silent on the reimbursement of exercise equipment to the Appellant of any kind whatsoever.

The Internal Review Officer, in his decision dated February 18, 2004, in confirming the case manager's decision in this respect, stated that one of the reasons the case manager declined coverage for the Bowflex was because *". . . There are no provisions in the legislation for the purchase of exercise equipment such a (sic) the Bowflex Versatrainer. . . "*.

The Commission notes that:

1. Section 10(1) of Manitoba Regulation 40/94 specifically deals with rehabilitation expenses, and is silent on the reimbursement of exercise equipment of any kind whatsoever.
2. Notwithstanding the absence of a provision in respect of exercise equipment, MPIC agreed to reimburse the Appellant for the cost of free weights but not for a Bowflex.

The Commission, however, further notes that in interpreting Section 10(1) of Manitoba Regulation 40/94 the Internal Review Officer failed to consider Section 138 of the MPIC Act which states:

> **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.

In two previous decisions of the Commission, [text deleted] (*AC- 01-100)* and [text deleted] (*AC-03-36)*, the Commission has determined that where Section 10(1) of Manitoba Regulation 40/94 is silent in respect of expenses requested by a claimant that MPIC is not prevented from exercising its jurisdiction under Section 138 of the MPIC Act to reimburse the Appellant's claim

for expenses. The Commission notes that MPIC does not agree with the Commission's interpretation of the relationship between Section 138 of the MPIC Act and Section 10(1) of Manitoba Regulation 40/94. MPIC has asserted that the Corporation's jurisdiction to exercise its power to take any measure it considers necessary or advisable under Section 138 is limited to the specific matters set out in Sections 10(1)(a)-(e) inclusive of Manitoba Regulation 40/94.

The Commission further notes that MPIC has appealed the decision of the Commission in [text deleted] *(AC-03-36)* in respect of the Commission's interpretation of Section 138 and its relationship to Section 10(1) of Manitoba Regulation 40/94 and is in the process of setting a date for the appeal in this matter in the Manitoba Court of Appeal. The Commission has therefore decided that until the Manitoba Court of Appeal determines that the Commission is incorrect in respect of its interpretation of the relationship between Section 138 and Section 10(1) of Manitoba Regulation 40/94, the Commission will continue to interpret these provisions in a manner consistent with its previous decisions in [text deleted] (*AC- 01-100)* and [text deleted] (*AC- 03-36)*.

Decision

The Commission therefore finds that MPIC erred in failing to apply Section 138 in order to determine whether or not it should reimburse the Appellant for the purchase of a Bowflex.

Section 184(1)(b) of the MPIC Act states:

> **Powers of commission on appeal**
> **184(1)** After conducting a hearing, the commission may
> . . .
> (b) make any decision that the corporation could have made.

The Commission therefore determines that:

1. the Bowflex, for the reasons outlined herein, is medically necessary for the rehabilitation of the Appellant's upper strength and endurance and to strengthen his hips;
2. pursuant to Section 138 of the MPIC Act it considers it necessary and/or advisable for the Appellant's rehabilitation, in order to lessen his disability resulting from the bodily injury arising from the motor vehicle accident; and
3. in order to facilitate his return to a normal life or reintegration into society it was medically necessary for him to exercise on a Bowflex.

Pursuant to Section 184(1)(b) of the MPIC Act, the Commission directs that MPIC reimburse the Appellant for the cost of a Bowflex, together with interest. Accordingly, the decision of MPIC's Internal Review Officer dated February 18, 2004 is rescinded and the Appellant's appeal is allowed in this respect.

5. Whether the Appellant is entitled to coverage for certain home modifications, including: Garage portion

The Appellant has requested reimbursement for the cost of providing for additional room in a garage at the residence for a wheelchair lift. The Internal Review Officer, in his decision dated February 23, 2004, rejected the Appellant's Application for the reimbursement of these costs for the following reasons:

> It was your indication that a certain amount of square footage of the garage in your residence is taken up by the wheelchair lift. This means that you unable to put two cars in the garage as a result.
>
> [MPIC's consultant] comments relating to the garage; sheltered vehicle transfer area are on page 40 of his report. Basically, it is indicated that you will require more time to transfer in and out of the vehicle and an attached garage would be the preferred area for this to take place given its sheltered nature. Although the garage is designed to all (sic) allow for the storage of two vehicles, you will require additional space to move to and from the vehicle to travel around the vehicle. According to [MPIC's consultant], the cost

> implications of allowing for the additional room required would amount to $29.00 a square foot times 200 square foot for a total of $5,800.00.
>
> If the garage had been built with the additional space, I would have viewed that as an extraordinary expense which would have been covered under the Personal Injury Protection Plan. However, I fail to see the Corporation's obligation to reimburse you for this amount when the cost was not incurred.

The Commission agrees with the reasons given by the Internal Review Officer in rejecting the Appellant's request for reimbursement of the garage costs. Accordingly, the decision of the Internal Review Officer in this respect dated February 23, 2004 is confirmed and the Appellant's appeal is dismissed.

6. Whether the Appellant is entitled to reimbursement for the cost of an all terrain vehicle (hereinafter referred to as 'ATV');

The Internal Review Officer, in his decision dated February 18, 2004 confirmed the decision of the case manager who rejected the Appellant's request for reimbursement for the purchase of an ATV. The Internal Review Officer determined that MPIC was not obligated to purchase an ATV because it was not a mobility aid within the meaning of Section 10(1) of Manitoba Regulation 40/94. The Internal Review Officer further determined that the ATV had no value in terms of a vocational rehabilitation plan.

In his decision dated February 18, 2004 the Internal Review Officer referred to the report of the Occupational Therapist, [text deleted], dated July 7, 2003 and stated:

> In that report [Appellant's occupational therapist] makes the following points supporting your request for reimbursement for the ATV, namely:
>
> 1. That you have suffered a tremendous loss of functional ability due to your injury.
> 2. That although gains have been made in the rehabilitative process in the area of self care, one must consider the entire person in the context of rehabilitation with respect to the physical, emotional and spiritual aspects of their life.

3. That in occupational therapy a person is assessed for what they can do for themselves and also to return the roles that they had in their lives prior to the disability.
4. That prior to the accident your roles in life included husband, father and employee.
5. That as part of your rehabilitation, you wish to resume the roles that you had previously had and fulfill them as independently as possible.
6. That you are no longer able to use your truck, the development of maintaining of your cottage home and the acquisition of an ATV combination with the trailer would serve as a replacement.
7. That the ATV would allow you to traverse rough in long-distance terrain which would be inaccessible by manual wheelchair.
8. That the ATV would serve a multiple of uses.
9. That the use of an ATV would assist with the emotional component of getting back to normal.
10. It was her belief that the ATV would very much contribute to your overall rehabilitation both physically and emotionally.

The Commission notes that in [Appellant's occupational therapist's] letter to the case manager, dated July 7, 2003, she stated in respect of the use of the ATV at the Appellant's summer cottage:

> His goal at this point of his rehabilitation is to resume roles he had previously and to again fulfill them as independently as possible. [The Appellant] played a very active role in the development and maintenance of their cottage home and worked strenously (sic) and diligently in his efforts. He would spend many hours of his time away from work, repairing, maintaining and upgrading his home and property. During the course of his day, he would utilize his truck to assist in these activities directly as a mechanism to haul or relocate tools and supplies, to assist in the maintenance and clean up of his home and property or to access neighbors and local amenities during the completion of all of these tasks. Now no longer able to utilize his truck for these purposes, the acquisition and use of an ATV in combination with an accessible trailer, would provide a close approximation of the powered mobility required to resume these roles and duties with maximum independence. The ATV would also allow for independent powered mobility over rough and long distance terrain where manual wheelchair propulsion at best would be difficult if not impossible. The ATV then would serve a multitude of uses, unlike other powered mobility, such as a scooter or power wheelchair, that is more one-dimensional in its purpose.

Appeal

The Appellant testified at the appeal hearing and indicated that both he and his wife spent a great deal of time at his cottage during the entire calendar year, and in particular in the spring, fall and summer. In his testimony he confirmed the statements made by [Appellant's occupational

therapist] in her letter to the case manager dated July 7, 2003 as set out above. The Commission finds that the Appellant testified in a straightforward and candid fashion without equivocation and finds him to be a credible witness and accepts his testimony in respect of his use of the ATV in the area surrounding his summer cottage.

The Commission finds that the Appellant has established, on a balance of probabilities, that the ATV was used by him as a motorized vehicle which assisted him to move from place to place in the area surrounding his summer cottage home.

The Internal Review Officer in his decision dated February 18, 2004 does not provide any reason for determining that the ATV was not a mobility aid under Section 10(1)(d)(ii) of Manitoba Regulation 40/94.

Section 10(1)(d)(ii) of Manitoba Regulation 40/94 states:

> **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.
>
> . . . .
>
> (ii) mobility aides and accessories;

The word "mobile" is defined in *Webster's New World College Dictionary, Fourth Edition,* as:

> **mobile . . . 1** *a)* moving, or capable of moving or being moved, from place to place *b)* moveable by means of a motor vehicle or vehicles . . . .
>
> **-mobile** . . . motorized vehicle designed for a (specified) purpose *[bookmobile,*

snowmobile]

The word “mobile” is defined in *The Concise Oxford Dictionary, Tenth Edition,* as:

> **mobile** . . . able to move or be moved freely or easily. . . .

The Commission finds, having regard to the testimony of the Appellant and the comments of [Appellant’s occupational therapist], that the ATV is a mobility aide within the meaning of Section 10(1)(d)(ii) of Manitoba Regulation 40/94. The Commission further accepts the opinion of [Appellant’s occupational therapist] that the use of the ATV will assist in the rehabilitation of the Appellant to resume the roles that he previously carried out independently prior to the motor vehicle accident. In her letter to the case manager, dated July 7, 2003, [Appellant’s occupational therapist] stated:

> Resuming pre-accident roles and responsibilities is critical and instrumental in the overall rehabilitation process. It assists with the emotional component of accepting long term disability as one begins to feel their life is "getting back to normal". They begin to independently take on the activities that defined who they were and how they fulfilled their responsibilities in life. Emotional healing is enhanced when a person feels that they can once again define their place in life and by the contributions that they make by resuming those roles. It is my belief that use of the ATV would very much contribute to [the Appellant’s] overall rehabilitation both physically and emotionally.

The Commission therefore determines that the Appellant has established, on a balance of probabilities, that the use of the ATV is a mobility aide within the meaning of Section 10(1)(d)(ii) of Manitoba Regulation 40/94. The Commission further finds that the Internal Review Officer erred in concluding that the ATV was not a mobility aide within Section 10(1)(d)(ii) of Manitoba Regulation 40/94 and therefore rescinds the decision of the Internal Review Officer, dated February 18, 2004 in respect of this matter and allows the Appellant’s appeal. The Commission directs MPIC to reimburse the Appellant for the cost of the purchase of the ATV together with interest.

Summary

In summary the Commission has determined:

1. The Appellant is not entitled to be reimbursed in the sum of $9,091.30 in respect of construction costs relating to the main level flooring;
2. The Appellant is not entitled to be reimbursed for the construction costs associated with landscaping and fencing at his residence;
3. The Appellant is entitled to reimbursement of the costs of the construction of a gym fitness area and two-piece bathroom in the basement area, together with interest;
4. The Appellant is entitled to reimbursement of the cost of the purchase of a Bowflex, together with interest;
5. The Appellant is not entitled to reimbursement for certain home modifications in respect of the garage;

6. The Appellant is entitled to reimbursement for the cost of the purchase of an all terrain vehicle, together with interest.

Dated at Winnipeg this 22nd day of March, 2005.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

PAUL JOHNSTON