



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-04

PANEL: Mr. Guy Joubert, Chairperson
Ms Mary Lynn Brooks
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry B. Kumka.

HEARING DATE: November 7 – 9, 2005

ISSUE(S):

1. Whether the entitlement of the Appellant to an Income Replacement Indemnity ("IRI") ended when he was [text deleted].
2. Whether the Appellant is entitled to a contribution pursuant to Section 138 of *The Manitoba Public Insurance Corporation Act*, R.S.M. 1987, c. P215 (the "Act") toward the costs of his attendant care.
3. Whether the Appellant is entitled pursuant to Section 138 of the Act to reimbursement for the following expenses:
 - (a) the purchase and modification of a second motor vehicle for his use while in [text deleted];
 - (b) the purchase of a second specialized mattress for his residence in [text deleted];
 - (c) the renovation of [text deleted] residence to make it wheelchair accessible;
 - (d) a subsidy to enable him to rent or purchase a three-bedroom residence in [text deleted] which can accommodate the Appellant and the attendants who travel with him from [text deleted];
 - (e) the purchase of a second (and presumably fully-equipped) wheelchair for his use while in [text deleted]; and
 - (f) the purchase and installation of other assistive devices for his residence in [text deleted].

RELEVANT SECTIONS: Sections 110, 131, 138, 172(1) and 184(1) of the Act. Section 10(1) of Manitoba Regulation P215 – 40/94 (“Regulation 40/94”)

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

A. BACKGROUND

On January 11, 1996, the Appellant was involved in a motor vehicle accident wherein he sustained a C-4 Spinal Cord Injury. The Appellant is completely paralyzed below the neck. The severity of the Appellant’s injuries are well-documented and not in dispute. As a quadriplegic, the Appellant is confined to a motorized wheelchair and he requires the assistance of attendants on a twenty-four hour basis.

The Appellant is a courageous and determined individual. Despite being the victim of a debilitating physical impairment, he nonetheless strove to make a life for himself and to lessen his dependency on others. The Appellant has no doubt come a long way in achieving independence and his determination in overcoming serious challenges in his life is certainly an inspiration for anyone who has met him, or heard about his story.

Following the motor vehicle accident, the Appellant returned to university and subsequently obtained a [text deleted] degree. [Text deleted]

The Appellant has received financial assistance and other benefits from the Respondent with respect to his rehabilitation, and to which he is entitled under the Act and regulations. The Respondent has been clearly supportive of the Appellant throughout his rehabilitative program and on the topic of his accomplishments, the Respondent's legal counsel stated that:

[t]here is little doubt that [the Appellant's] achievements far exceed those of the vast majority of individuals who have sustained similar injuries of a severe nature. The Appellant has succeeded in his attempt to become [text deleted] whereas many other Canadians (perhaps thousands) have failed in the attempt. It is to be noted that not only has [the Appellant] succeeded in becoming [text deleted], but he has established he is capable of carrying out the duties of this demanding position. He has also accepted the added responsibility of serving as [text deleted] in addition to his role as [text deleted].

On August 9, 2004, the Appellant, through his counsel, filed an application for review of a decision of a senior case manager pursuant to Section 172(1), of the Act which reads as follows:

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

The application related to a decision dated August 4, 2004, wherein the senior case manager denied the Appellant's eight claims which now constitute the eight Issues in the present appeal.

In his written decision, the senior case manager informed the Appellant that:

[i]n accordance with Section 110(1)(e) of the MPIC Act, your entitlement to IRI benefits ceased once you began drawing your salary as [text deleted]. Operating on the assumption that your earnings commenced on the day of [text deleted], you [sic] IRI payments will be terminated accordingly.

Your IRI will be reinstated if you are no longer able to perform your duties as [text deleted] for reasons associated with your injuries suffered in the above mentioned accident.

In regards to the issue of Attendant Care Costs please be advised that this was addressed in our decision letter of January 18, 2002 (copy enclosed). You are already receiving the maximum benefits allowable under Section 131 (personal assistance expenses).

Manitoba Public insurance has taken considerable measures to assist and contribute to your rehabilitation in accordance with Section 138 of the MPIC Act. You have now been rehabilitated to the point where you are no longer disabled from holding employment.

Therefore, in regard to points 3 through 8 listed above, it is the Corporation's position that these items represent additional expenses directly related to your choice of employment. There is no coverage provided under the MPIC Act of [sic] Regulations for these expenses.

In response to the Appellant's request for a review, an internal review officer of the Respondent conducted a paper review of the Appellant's file and issued a decision on September 13, 2004, wherein the internal review officer advised the Appellant that:

1. The preamble to Section 110(1) and subsection 110(1)(e), when read together, clearly state that [the Appellant] "cease[d] to be entitled to an [IRI]" when he began drawing his [text deleted] salary.

Unlike subsections 110(1)(a) and (d), subsection 110(1)(e) makes no reference to his ability to hold the employment in question.

If changes in physical or psychological condition occur in the future such that he becomes unable to perform the duties he is currently capable of performing, Section 117 may apply. This is, however, pure speculation at this point in time.

2. Section 138 is "subject to the regulations". There is a specific regulation (Manitoba Regulation P215-40/94) which deals in some detail with personal care assistance. [The Appellant] continues to receive the maximum benefit available under the heading of "personal care assistance" (Section 131). This, in my view, takes the whole issue of attendant care entirely outside the ambit of Section 138.

[The Appellant] will undoubtedly need to have a personal attendant present with him while he goes about fulfilling his duties as [text deleted], as he will as he goes about all of his other activities of daily living – in [text deleted], and wherever else his travels take him. This reality does not, however, transform the essential character of the attendant care being

provided from “personal” assistance to “rehabilitative” assistance.

There is no obligation on MPI to provide additional funding for attendant care under Section 138 when it is already providing the maximum amount available for such care under Section 131.

3. The above reasoning also applies to the other expenses being claimed. In particular:
 - a. Section 10(1)(a) of Manitoba Regulation P215-40/94 stipulates that MPI may provide funding to adapt a motor vehicle. It has already provided funding to [the Appellant] under this heading. There is no obligation on MPI to fund the purchase, or adaptation, of a second motor vehicle – regardless of where, or for what purpose, [the Appellant] intends to use it.
 - b. Section 10(1)(b)(i) of Manitoba Regulation P215-40/94 stipulates that MPI may provide funding to alter a principal residence. It has already provided funding to [the Appellant] under this heading. There is no obligation on MPI to contribute financially to the purchase, or alteration, of a second residence, regardless of where that second residence is located, or what use [the Appellant] intends to make of it.

[Note: These comments relate specifically to the items numbered 5 and 6 in the August 4, 2004 decision letter from the case manager.]

- c. Section 10(1)(d) of Manitoba Regulation P215-40/94 stipulates that MPI may provide funding for wheelchairs and accessories, medically required beds, equipment, and accessories, and various other assistive devices (primarily for use in the home). It has already provided funding to [the Appellant] under this heading. There is no obligation on MPI to fund the purchase of a second set of devices falling into these various categories.

[Note: These comments relate specifically to the items numbered 4, 7 and 8 in the August 4, 2004 decision letter from the case manager.]

In summary, this review has confirmed the decisions of the case manager set out in his letter dated August 4, 2004.

The Appellant then filed with this Commission, a Notice of Appeal dated October 4, 2004, wherein the Appellant appealed the decision of the internal review officer.

B. RELEVANT SECTIONS OF THE ACT AND REGULATIONS

The Act

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;

131 Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

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.

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

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

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

Regulation 40/94

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 a motor vehicle for the use of the victim as a driver or passenger;
- (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 an 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.

C. THE POSITION OF THE PARTIES

The Appellant

With respect to whether the Appellant's entitlement to the IRI ceased once he was [text deleted], the Appellant's legal counsel argued, in part, that:

[t]he Corporation is apparently relying on the provision of the Act which became operative when the victim of an accident becomes rehabilitated and enters into employment. This provision do [sic] not apply to [the Appellant]. He has not entered into employment. There is no employer-employee relationship for [text deleted]. [The Appellant] could theoretically claim that his income replacement should continue. He did not do this. But he does seek from the commission [sic] a declaration that his income replacement would be available if for any reason, he ceases to be [text deleted] [sic]. He previously received such assurance by letter dated February 14 2000 from the President of the Corporation who said

“This letter is our commitment that if your [sic] are unable to earn income because of your disability, you will be entitled to the income replacement indemnity. This commitment would continue until age 65, at which point you may become eligible for a Retirement Income Benefit. Secondly if you earn income, 75% of the earnings will be deducted from the IRI benefit, making sure that you can benefit from seeking employment.”

As for the balance of the issues under appeal, the Appellant's legal counsel argued, in part, that:

[The Appellant] is now [text deleted] [sic]. In order to function as [text deleted], he must be facilitated to fulfill his responsibilities. This is absolutely necessary to accomplish his rehabilitation and his restoration to his pre-accident level of function. It is also necessary so that he could return as nearly as practicable to his condition before the accident and improve his earning capacity and level of activity. Section 138 and/or regulation 10:1 are available to him to achieve this objective...

And finally, with respect to the Respondent's interpretation and application of Section 131 of the Act to limit the Appellant's access to additional attendant care expenses, Appellant's legal counsel argued that:

[w]hen [the Appellant] [sic] is [text deleted], he is not employing his attendant for personal care assistance. His attendant is an adjunct to [the Appellant] and is required at all times as a medical necessity. This was the uncontradicted evidence presented by [Appellant's Doctor] and should be obvious. If an attendant care was not provided to a C-4 quadriplegic victim, then rehabilitation would be impossible and the objectives of the Act would be rendered nugatory.

The Respondent

As to whether the Appellant's entitlement to an IRI ended when he was [text deleted], the Respondent's legal counsel pointed out that this issue became mute (sic) because the Appellant testified at the Hearing that he was not seeking an on-going IRI, but rather a Declaratory Order of this Commission that the IRI would become available to him, if for any reason, he ceased to be [text deleted]. Counsel then argued that this Commission did not have jurisdiction to make a Declaratory Order of this nature pursuant to the Act and regulations. In this regard, counsel for the Respondent relied on Section 184(1) of the Act which provides that:

- 184(1) After conducting a hearing, the commission may
- (a) confirm, vary or rescind the review decision; or
 - (b) make any decision that the corporation could have made.

In addition, counsel pointed out that the Commission previously confirmed that it lacked the jurisdiction to make a decision on a hypothetical question and in this regard, reference was made to two earlier decisions, namely: *[Text deleted]* (AC-99-128) and *[text deleted]* (AC-01-44). As well, counsel suggested that if the Appellant was of the view he was entitled to an IRI at some future point in time, he would be at liberty to make an application at that juncture. In addition, counsel proposed that:

[The Appellant] would then be entitled to receive a further Claims Decision from his Case manager addressing his entitlement or non-entitlement to further IRI benefits based upon the evidence in existence at the time in conjunction with the terms of the MPIC Act and Regulations.

Returning to the question of an entitlement to the IRI, the Respondent's counsel stated that:

[a]lthough [the Appellant] acknowledges that he is not entitled to a receipt of further IRI benefits following his [text deleted], he makes that acknowledgement without agreeing to the proposition that he holds an employment. It should be noted that [the Appellant] was in receipt of IRI benefits based upon a Gross Yearly Employment Income of approximately \$60,333.00 up until the date of the termination which is slightly below the maximum yearly insurable earnings of \$65,000.00. Contrary to the position taken by the Appellant, his IRI was indexed annually (see tab 19) for inflation. His salary as [text deleted] was acknowledged to be \$140,000.00 a year. It was conceded by [the Appellant] that these monies are taxable to him as employment income. The Respondent points out that the termination of [the Appellant's] IRI benefits resulted from the application of Section 110(1)(e) of the Act (Schedule E) which states:

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined.

The termination of [the Appellant's] IRI under Section 110(1)(e) was based upon the fact that he holds an employment which has a gross income which exceeds that upon which his Income Replacement Indemnity entitlement was based. This is different from Sections 110(a)(b) and (c) of the Act which refers to a victim's ability to hold an employment only...

Regarding the additional attendant care costs, the Respondent's position is, in essence, that the additional attendant care expenses are not rehabilitation expenses in that they arise as a result of the Appellant's decision to seek the position of [text deleted] with the knowledge that extraordinary expenses would be incurred. Furthermore, the Respondent argues that since these extraordinary expenses have been created by the Appellant's choice of employment, the associated costs should be borne by him given that the Respondent could not increase the personal home assistance beyond the statutory limit contemplated by Section 131.

It is the Respondent's position that Section 138 ought not override Section 131 and in support of this argument, the Respondent relies on the decision of Mr. Justice Kroft in *Fletcher v. Manitoba Public Insurance Corp.*, 2003 MBCA 62 ("*Fletcher*"), where leave to appeal was denied. That case dealt with an appeal [text deleted] of a decision of this Commission that found additional health care expenses were not necessary in order to fulfill occupational rehabilitation. In addition, the Respondent relies on *Menzies v. Manitoba Public Insurance Corporation et al.* 2005 MBCA 97 ("*Menzies*"). In that case, the Manitoba Court of Appeal noted that where there was a payment regime covering expenses, Section 138 could "not be a means by which further or greater expenses could be reimbursed."

With respect to the claims for additional costs relating to a second motor vehicle, specialized mattress, renovation to a residence, subsidy for a residence to accommodate attendants, second wheelchair and assistive devices for the second residence, the Respondent relies on the above-noted arguments and that the Respondent has already provided funding for these expenses in Winnipeg. The Respondent takes the position that it is not obligated to duplicate these expenses when the original items are still in use.

D. DECISION – ISSUES UNDER APPEAL

The facts in this case are unique. We have an Appellant who was the victim of a terrible accident that left him severely disabled and unable to pursue his new career as a [text deleted]. Despite the trauma of the accident and the struggle at achieving some form of normalcy in his life, the Appellant managed to re-shape his future by focusing on his abilities, interests and strengths, and then embarking upon a new educational program that would best position him for success in life. The Appellant was assisted by the Respondent throughout this process.

The Appellant was nonetheless faced with limited options as to career choices that might be available to him. This picture is perhaps best described in a report dated April 30, 2003, and issued by the firm of [text deleted]. The report dealt with the Appellant's employability and the author concluded, in part, that:

[b]ased on the information received and analyzed, it is our opinion that while [the Appellant] has an educational background, set of skills and experiences that employers would potentially find attractive, there are significant complicating factors and a uniqueness to his case that make employability in the traditional sense less likely. The level of risk, the required accommodations an employer would have to incorporate [sic] and the flexibility they would have to demonstrate significantly limits [the Appellant's] options given the labour market in which he is competing.

It is our opinion that when all factors are considered, [the Appellant's] employability is questionable. After consultation with executive recruiting and human resource industry experts we were not able to identify specific employers who would be interested in employing an individual with [the Appellant's] capabilities and requirements, nor do we feel it is realistic or practical to expect that there are many employers in [text deleted] who would do so. Those potential positions that were identified through job advertisement searches have aspects about each of them that could make them less viable options and would require further investigation before making a final determination.

Given the nature of his situation and the fact that he wants to make a contribution to society, [the Appellant] is going to have to increase his competitive advantage more than an able-bodied person.

The Appellant did ultimately obtain a [text deleted] degree and later, he secured employment in [text deleted]. With respect to his interests in [text deleted], he testified that he always had strengths in that area. He mentioned that when he looked back on his life prior to the accident, he was usually the "lead guy" in that he had participated in various organizations in some form of leadership or [text deleted] capacity. For instance, he had been president of [text deleted], president of the [text deleted] and president of the [text deleted]. In addition, he had been

involved with various committees, groups and a [text deleted] in the years leading up to the accident.

The Respondent suggests that the Appellant ought to have found employment in [text deleted] and since he chose [text deleted], he should be responsible for all additional expenses associated with being [text deleted]. In his written arguments, counsel for the Respondent indicated that:

...Moreover, it is respectfully submitted that the existence of PIPP does not absolve [the Appellant] from ramifications resulting from decisions he has chosen to make along the way. In choosing [text deleted], [the Appellant] was well aware that his decisions, if successful, would result in a significant extraordinary additional attendant and related costs which MPI would not cover under PIPP. That point was made by the Internal Review Officer [text deleted] who indicated on page 5 of his September 13, 2004 decision [Tab 2]

“[The Appellant] was well-aware when he began the pursuit of his goal to become [text deleted] that he would be faced with significant costs associated with maintaining two residences, operating two vehicles, traveling between [text deleted] and [text deleted], and providing accommodations for his attendants (including travel, meals, and sleeping accommodations). With the exception of the attendant expenses, these costs are a reality for every [text deleted] whose principal residence is not within ready driving distance of [text deleted].

Prior to seeking [text deleted], [the Appellant] was also well-aware that MPI – having already made substantial financial contributions to his education and, on an ongoing basis, to his attendant care expenses – was not prepared to fund those known, and anticipated, additional expenses.”

The Commission disagrees with this point of view. In fact, the Appellant ought to be commended for correctly assessing his abilities, interests and strengths, and then executing a

plan of action that brought him to where he is today. He managed to secure a rewarding employment despite numerous obstacles.

The substance of the Appellant's position is that he is not asking the Respondent to pay for additional expenses that he [text deleted] would otherwise incur as a result of having two residences and being required to travel between home and [text deleted]. [Text deleted] provides allowances and pays for those costs and what is not covered by [text deleted], is paid for by the [text deleted] in question, including the Appellant. What the Appellant is asking the Respondent to do is to pay for those expenses that arise as a result of his injuries and are above and beyond what [text deleted] and the Appellant would otherwise be required to shoulder.

1. Whether the entitlement of the Appellant to an IRI ended when he was [text deleted]?

Before addressing the issue of whether the Appellant's entitlement to an IRI ended when he was [text deleted], we are of the view that it is appropriate to consider two related issues at this time. The first issue pertains to whether the Appellant is an employee of the [text deleted] or, in other words, whether there is an employer-employee relationship on the scene. Counsel for the Appellant contends that "[t]here is no employer-employee relationship for a [text deleted]". In this regard, we respectfully disagree. The Appellant's counsel has not succeeded in showing us that there is no employer-employee relationship in place. We find that for the purposes of the Act only, the Appellant is indeed an employee of the [text deleted]. We are mindful that the role of [text deleted] may not squarely fit into the traditional employer-employee relationship. [Text deleted]. In addition, the Appellant testified that his salary as [text deleted] is taxable as employment income. All of this is indicative of an employment relationship. In the event we are incorrect in this assessment, we are of the view that this would not, in isolation, negatively

impact upon our finding with respect to the question pertaining to the entitlement to IRI as discussed below.

The second issue is rooted in the characterization of the Appellant's employment as being either a temporary full-time employment or a regular full-time employment. In other words, is the Appellant's employment temporary in the sense that it will last for an identifiable term? Or, is the Appellant's employment regular in that it will last for a term that is not readily identifiable? In this regard, we find that the Appellant's employment is a temporary or term employment because its term is identifiable [text deleted].

Turning now to the issue of whether the entitlement of the Appellant to an IRI ended when he was [text deleted], this Commission finds that the Appellant's entitlement to an IRI did not end when he was [text deleted] rather, it was suspended for a period of time equal to his term [text deleted]. We are of the opinion that this decision is consistent with a fair, large and liberal interpretation of the Act that best assures the attainment of its objects.

Given the Appellant's severe disability and the challenges he faces with respect to finding regular employment, we are of the view that it would be contrary to public policy, and the spirit and intent of the Act, to terminate the entitlement to an IRI in a situation where he has accepted temporary employment. In these circumstances, a victim should not be penalized by losing this important benefit if he chooses a temporary employment when he faces a paucity of employment options because of his disability. We submit that the drafters of the legislation never intended the measures under Section 110(1)(e) to apply in this unique situation.

In addition, we find that applying Section 110(1)(e) in these circumstances would potentially discourage any victim from accepting temporary employment because the victim would not want to be cut off from an IRI when that employment ceased. This scenario would certainly hinder the rehabilitation of the victim.

Taking all of the above into consideration, we find that the Respondent misinterpreted Section 110(1)(e) of the Act as being applicable to a situation where a victim has accepted a temporary employment and as a result, it erred in determining that the entitlement to an IRI ended when the Appellant was [text deleted]. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review officer's decision dated September 13, 2004, with respect to this issue is rescinded. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we order that the entitlement to an IRI be suspended for a period of time equal to the Appellant's term [text deleted].

As an aside, we point out that if the Act is interpreted in this narrow fashion as suggested by the Respondent, then the Respondent would lose the benefit of the set-off against the IRI that it would otherwise receive because conceivably, more victims would not readily accept temporary employment and opt to collect IRI instead.

On a final note, and with respect to the request by the Appellant's counsel that this Commission grant a Declaratory Order that "his income replacement would be available, if for any reason, he ceases to be a [text deleted] [sic]", we are of the view that in light of the foregoing decision, it is not necessary at this time for this Commission to consider this remedy, and whether it has jurisdiction to grant the same.

2. *Whether the Appellant is entitled to a contribution pursuant to Section 138 of the Act toward the cost of his attendant care?*

Section 131 and accompanying regulations constitute a payment regime for the reimbursement of expenses for personal home assistance. Arguably, the broad power of Section 138 cannot be invoked to obtain additional reimbursement for the same expenses. In *Menzies*, the Manitoba Court of Appeal considered the payment regime under Section 137 and accompanying regulations, and whether Section 138 could be used for additional reimbursement. Freedman, J. stated at page 11 (with respect to Section 137) that:

[t]ogether 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.

The Respondent is already paying to the Appellant the maximum amount contemplated by Section 131 for personal home assistance. We concur with counsel for the Respondent that the Respondent does not have any discretion to cover expenses for personal home assistance beyond this statutory limit. However, we are of the view that Section 138 may apply if the attendant care expenses are not for “personal home assistance”, and they otherwise meet the requirements of the legislation and/or regulations.

Taking all of the above into consideration, we find that the Respondent did not fully consider the possible application of Section 138 and as a result, it erred in denying the Appellant’s claim. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review officer’s decision dated September 13, 2004, with respect to this issue is rescinded. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we order that the Appellant’s claim shall be referred back to the case manager for determination. We direct the Respondent to re-consider the Appellant’s request for a contribution toward attendant care

expenses in light of the possible application of Section 138. The Commission shall retain jurisdiction on this issue, and either party may upon reasonable notice refer this matter back to the Commission for final determination.

3. Whether the Appellant is entitled pursuant to Section 138 of the Act to reimbursement for the following expenses:

a) The purchase and modification of a second motor vehicle for his use while in [text deleted]?

The Respondent argued, in part, that it has already provided funding to adapt a motor vehicle in [text deleted] and that it has no obligation to duplicate this expenditure.

The Commission notes that Section 10(1)(a) of Regulation 40/94 provides, in part, that where the Respondent considers it necessary or advisable for the rehabilitation of a victim, it may provide the victim with funds for an extraordinary cost required to adapt a motor vehicle for the use of the victim as a driver or passenger. Regulation 40/94 is silent with respect to the purchase of a motor vehicle. Since the appellant is requesting funds for the purchase of a motor vehicle, the powers contemplated by Section 138 may apply to cover that expense if the Respondent, in its discretion, is satisfied that the expense is necessary or advisable to contribute to the rehabilitation of the Appellant. In this regard, we are mindful of Freedman, J.'s comments in *Menzies* at page

11:

[i]n respect of those matters outlined in some detail in s.10(1), any exercise of discretion by MPIC under s. 138 would be limited, as described in s. 10(1). If, for example, reimbursement was sought for a victim's occupational rehabilitation expense, then provided that the rehabilitative measure was necessary or advisable for the rehabilitation, the payment could be made (*see [text deleted]*). 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.

Taking all of the above into consideration, we find that the Respondent misinterpreted the possible application of Section 138 in a situation where Regulation 40/94 is silent with respect to the expense in question. As a result, we are of the view that the Respondent erred in denying the Appellant's claim because it did not fully consider the possible application of Section 138. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review officer's decision dated September 13, 2004, with respect to this issue is hereby rescinded. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we order that the Appellant's claim shall be referred back to the case manager for determination. We direct the Respondent to re-consider the Appellant's request for the purchase of a second motor vehicle for his use while in [text deleted] in light of the possible application of Section 138. The Commission shall retain jurisdiction on this issue and either party may upon reasonable notice refer this matter back to the Commission for final determination.

b) The purchase of a second specialized mattress for his residence in [text deleted]?

Counsel for the Appellant argued that as [text deleted], the Appellant requires a special mattress in his [text deleted] residence like the one now provided in [text deleted]. The Respondent argued, in part, that it ought not to be required to duplicate this expense.

Section 10(1)(d)(iii) of Regulation 40/94 provides for the reimbursement for medically required "beds, equipment and accessories" where the Respondent considers it necessary or advisable for the rehabilitation of a victim. Although this Section does not mention the word mattresses, we

find that it would be a reasonable interpretation to read “beds” as including “mattresses”. We find guidance and support for this interpretation in Katherine Barker, Editor-in-Chief, *The Canadian Oxford Dictionary*, Don Mills, Ontario, 1998, where the word bed is defined, in part, at page 117 as follows:

1. (a) a piece of furniture used for sleeping or resting on, usu. a box spring and a mattress.
(b) a mattress and covers...

In this case, the Regulation 40/94 clearly contemplates the reimbursement for more than one item. Because of the Appellant’s unique medical requirements, he needs a specialized mattress. In a typical situation, if one exists in Manitoba, a victim with similar injuries would likely have needed only one mattress if he/she were residing and working in Manitoba. On the other hand, the nature of the Appellant’s employment is such that not only does he reside in [text deleted], but he must also reside in [text deleted] for periods of time. One can only presume that the rationale for the supply of the one mattress in [text deleted] is the same as it would be for [text deleted]. The fact that the Appellant works in [text deleted] or chose to do so is insufficient to deny the claim. The Respondent’s argument in this regard is simply not compelling.

The Commission finds that Section 10(1)(d)(iii) of Regulation 40/94 is sufficiently broad to enable the Respondent to provide funding with respect to a second specialized mattress for the Appellant’s residence in [text deleted]. We are of the view that the purchase of a second specialized mattress is necessary and advisable for the rehabilitation of the Appellant.

Taking all of the above into consideration, we find that the Respondent misinterpreted Section 10(1)(d)(iii) of Regulation 40/94 and as a result, it erred in denying the Appellant’s claim. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review

officer's decision dated September 13, 2004, with respect to this issue is hereby rescinded. The Appellant's appeal is allowed. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we authorize the purchase of a specialized mattress for the Appellant's residence in [text deleted], or the reimbursement of reasonable expenses in the event the mattress has already been purchased by or for the Appellant.

c) The renovation of [text deleted] Residence to make it wheelchair accessible?

The evidence before the Commission is that the Respondent has paid for the alteration of the Appellant's principal residence in [text deleted] in order to make it wheelchair accessible. Also, we note from the Appellant's evidence that the residence in [text deleted] has been modified in a like manner however, the cost associated with that alteration was covered by [text deleted].

Section 10(1)(b)(ii) of Regulation 40/94 contemplates the Respondent providing funds for an extraordinary cost to alter a victim's principal residence where that individual does not own the same and such expenditure is considered necessary or advisable. Unfortunately, 10(1)(b)(ii) of Regulation 40/94 speaks to the alteration of one residence, or "principal residence", and it does not contemplate an additional residence or residences. While it may be necessary or advisable to provide funding for the alteration of a second residence, Regulation 40/94 limits such coverage to one principal residence.

Unfortunately, neither the Respondent nor this Commission has the discretion to authorize expenses beyond what is clearly contemplated by the legislation and regulations. We find that the Respondent correctly interpreted Section 10(1)(b)(ii) of Regulation 40/94 and that the Appellant failed to show that the Respondent erred in denying his claim. Pursuant to the

authority vested in this Commission under Section 184(1)(a) of the Act, we confirm the internal review officer's decision dated September 13, 2004, with respect to this issue.

d) A subsidy to enable the Appellant to rent or purchase a three-bedroom residence in [text deleted] which can accommodate the Appellant and the attendants who travel with him from [text deleted]?

On the basis of our reasoning in Section D(3)(a) of this Decision relating to the issue of the purchase and modification of a second motor vehicle, we find that the Respondent misinterpreted Section 138 in a situation where Regulation 40/94 is silent with respect to the expense in question and as a result, it erred in denying the Appellant's claim because it did not fully consider the possible application of Section 138. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review officer's decision dated September 13, 2004, with respect to this issue is hereby rescinded. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we order that the Appellant's claim shall be referred back to the case manager for determination. We direct the Respondent to re-consider the Appellant's request for a subsidy while taking into consideration the possible application of Section 138. The Commission shall retain jurisdiction with respect to this issue and either party may upon reasonable notice refer this matter back to the Commission for final determination.

e) The purchase of a second (and presumably fully-equipped) wheelchair for the Appellant's use while in [text deleted]?

The Appellant's evidence is that he needs a second fully equipped wheelchair for his use in [text deleted] because of potential delays in transporting the chair by air from [text deleted] in smaller regional aircraft. In a letter dated May 12, 2005, from [text deleted], Manager, Station Operations – Prairies (Air Canada), [text deleted] commented on the complexities of transporting

a chair that is “significantly larger than a traditional wheelchair, and contains batteries that are considered dangerous goods”. He also stated that:

[t]he operational issues surrounding the handling of the chair are driven by both the size and design of this particular unit. Once [the Appellant] is seated on the aircraft, the chair must be pushed up the jet way, and lowered to ramp level in a service elevator. It is then taken to our baggage area, where it has the battery units disconnected and secured, as batteries are considered dangerous goods for shipment by air. The chair is then partially collapsed, and loaded onto a cargo dolly. Due to the weight of the chair, we have manufactured ramps allowing the staff to push the chair onto the dolly rather than attempting to lift the chair, risking injury or damage. Once the chair reaches the aircraft, several ramp staff are normally required to participate in loading the chair. It then must be fully secured to prevent movement onboard to ensure compliance with dangerous goods regulations. If a connection was to occur, this process would be followed at the connection station and the potential exists to misconnect the chair, or delay a flight if the connection was of short duration. We attempted to arrange aircraft routings which would ensure that [the Appellant] and his chair remained on the same aircraft from [text deleted]. Unfortunately, rerouting of an aircraft has ramifications across the fleets that are difficult to manage, and the potential existed to negatively effect (sic) our entire network.

It is clear to us that the Appellant’s need for the motorized wheelchair is the same in [text deleted] as it is in [text deleted]. The Appellant’s employment is in [text deleted] and [text deleted] and because of his unique medical condition he requires a motorized wheelchair not only for mobility, but also for his on-going rehabilitation. Transporting that same wheelchair from [text deleted] to [text deleted] and back is impractical, and would seriously inconvenience the Appellant if it were damaged or not delivered to him in conjunction with his arrival at the airport. Apart from a serious inconvenience, this delay or damage would negatively affect his mobility and potentially, his health if he were forced to use a chair that is not set up for his unique needs.

Section 10(1)(d)(i) of Regulation 40/94 provides for the reimbursement for wheelchairs and accessories where it is necessary and advisable for the rehabilitation of a victim. The Regulation clearly contemplates reimbursement for more than one wheelchair. Under the circumstances, we are of the view that it is necessary and advisable for the rehabilitation of the Appellant that the Respondent purchase the wheelchair in question.

Taking all of the above into consideration, we find that the Respondent misinterpreted Section 10(1)(d)(i) of Regulation 40/94 and as a result, it erred in denying the Appellant's claim. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review officer's decision dated September 13, 2004, with respect to this issue is hereby rescinded. The Appellant's appeal is allowed. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we authorize the purchase of the second wheelchair, or the reimbursement of reasonable expenses for the same in the event the second wheelchair has already been purchased by or for the Appellant.

f) The purchase and installation of other assistive devices for the Appellant's residence in [text deleted]?

On the basis of our reasoning in Section D(3)(b) of this Decision relating to the issue of the purchase of a second specialized mattress, we find that Section 10(1)(d) of Regulation 40/94 contemplates the reimbursement of a victim at the sole discretion of the Corporation for a variety of assistive devices. The Regulation is broadly worded and contemplates more than one such device. For reasons previously stated with respect to the unique facts of this case, this Commission finds that it is both necessary and advisable that the Appellant be allowed to purchase and install other assistive devices for his residence in [text deleted] similar to those currently at his primary residence in [text deleted].

Taking all of the above into consideration, we find that the Respondent misinterpreted Section 10(1)(d) of Regulation 40/94 and as a result, it erred in denying the Appellant's claim. In light of this finding, and in accordance with Section 184(1)(a) of the Act, the internal review officer's decision dated September 13, 2004, with respect to this issue is rescinded. The Appellant's appeal is allowed. Pursuant to the authority vested in this Commission under Section 184(1)(b) of the Act, we authorize the purchase and installation of assistive devices for the Appellant's residence in [text deleted], or the reimbursement of reasonable expenses for the same in the event these devices have already been purchased and installed by or for the Appellant.

E. DECISION – SUPPLEMENTARY ARGUMENTS

1. The Charter

The Appellant's legal counsel raised some arguments with respect to the alleged violation of the Appellant's rights under the Charter. In this regard, Counsel stated that:

... [The Appellant] is a citizen of Canada and any restriction which would deny him his right to participate in the democratic process to the nth degree is a denial of his right to life, liberty and the security of the person as guaranteed by the Canadian Charter of Rights and Freedom [sic]. It is also a denial of his Charter Rights to equality and mobility.

[The Appellant] [sic] argues that such denial is improper, illegal and contrary to the philosophy of the legislation.

This is the fundamental issue in this case.

Other than the above-noted statements, counsel for the Appellant has not dealt with the Charter arguments in any substantive manner, nor has he submitted any case-law in support of the positions being advanced. In addition, the Commission notes that the issue of possible Charter arguments was first raised at a Pre-Hearing of this case on May 10, 2005, where counsel for the Appellant advised that he did not intend to challenge the provisions of any Act. However, he did

mention that he was of the view that an interpretation not to grant the Appellant's expenses was contrary to his constitutional rights. At that time, this Commission reminded counsel for the Appellant that if he intended to launch a constitutional challenge, that he may be required to adhere to the notice provisions contemplated by the *Constitutional Questions Act*, S.M. 1986 – 87, c.31 – Cap. C180.

When taking all of the above into consideration, this Commission finds that it would be inappropriate to deal with the Appellant's Charter arguments especially when these arguments were barely mentioned at the Hearing and in the written submissions. The Commission is of the view that this is not the proper forum to deal with these matters at this time.

2. Appellant's Allegations of Impropriety by the Respondent

The Appellant and his counsel alleged during the course of the Hearing and in the written arguments, that there had been some impropriety by the Respondent in the handling of the Appellant's claims. Furthermore, this Commission was advised that there is a pending lawsuit before the Court of Queen's Bench that deals, in part, with these allegations. We are of the opinion that there was insufficient evidence brought before this Commission with respect to these allegations and we defer to the Court of Queen's Bench. Furthermore, we advise that we have not drawn adverse inferences from these allegations. Based upon the evidence before this Commission, we have seen nothing untoward in the manner that the Respondent handled the Appellant's case. In fact, we are of the view that the Respondent and its personnel have over the years handled the Appellant's case in a compassionate manner.

F. SUMMARY OF DECISION RELATING TO ISSUES UNDER APPEAL

In summary, we find with respect to the issues under appeal that:

1. Whether the entitlement of the Appellant to an IRI ended when he was [text deleted]?

The Respondent misinterpreted Section 110(1)(e) of the Act as being applicable to a situation where a victim has accepted a temporary employment and as a result, it erred in terminating the Appellant's entitlement to an IRI. The Appellant's entitlement to an IRI did not end when he was [text deleted] rather, it was suspended for a period of time equal to the Appellant's term [text deleted].

2. Whether the Appellant is entitled to a contribution pursuant to Section 138 of the Act toward the costs of his attendant care?

The Respondent misinterpreted Section 138 of the Act and as a result, it erred in denying the Appellant's claim because it did not fully consider the possible application of this Section. The Respondent is directed to re-consider the Appellant's request for a contribution toward attendant care expense while taking into account the possible application of Section 138.

3. Whether the Appellant is entitled pursuant to Section 138 of the Act to reimbursement for the following expenses:

a) The purchase and modification of a second motor vehicle for his use while in [text deleted]?

The Respondent misinterpreted Section 138 of the Act and as a result, it erred in denying the Appellant's claim because it did not fully consider the possible application of Section 138 in a situation where Regulation 40/94 is silent with respect to the expense in question. The Respondent is directed to re-consider the Appellant's claim for the purchase of a second motor vehicle while taking into account the possible application of Section 138.

b) The purchase of a second specialized mattress for his residence in [text deleted]?

The Respondent misinterpreted Section 10(1)(d)(iii) of Regulation 40/94 and as a result, it erred in denying the Appellant's claim. The Appellant's appeal is allowed. We authorize the purchase of a specialized mattress for the Appellant's residence in [text deleted], or the reimbursement of reasonable expenses in the event the mattress has already been purchased by or for the Appellant.

c) The renovation of [text deleted] residence to make it wheelchair accessible?

The decision of the Respondent which turned down the Appellant's request to fund the alteration of the [text deleted] residence is upheld. The Respondent correctly interpreted Section 10(1)(b)(ii) of Regulation 40/94 in denying the Appellant's claim. The Appellant failed to show that the Respondent erred in denying the claim. We confirm the internal review officer's decision dated September 13, 2004, with respect to this issue.

d) A subsidy to enable the Appellant to rent or purchase a three-bedroom residence in [text deleted] which can accommodate the Appellant and the attendants who travel with him from [text deleted]?

The Respondent misinterpreted Section 138 of the Act and as a result, it erred in denying the Appellant's claim because it did not fully consider the possible application of Section 138 in a situation where Regulation 40/94 is silent with respect to the expense in question. The Respondent is directed to re-consider the Appellant's request for a subsidy while taking into account the possible application of Section 138.

e) The purchase of a second (and presumably fully-equipped) wheelchair for the Appellant's use while in [text deleted]?

The Respondent misinterpreted Section 10(1)(d)(i) of Regulation 40/94 and as a result, it erred in denying the Appellant's claim. The Appellant's appeal is allowed. We authorize the purchase of a second (and presumably fully-equipped) wheelchair for the Appellant's use while in [text

deleted], or the reimbursement of reasonable expenses in the event the wheelchair has already been purchased by or for the Appellant.

f) The purchase and installation of other assistive devices for his residence in [text deleted]?

The Respondent misinterpreted Section 10(1)(d) of Regulation 40/94 and as a result, it erred in denying the Appellant's claim. The Appellant's appeal is allowed. We authorize the purchase and installation of assistive devices for the Appellant's residence in [text deleted], or the reimbursement of reasonable expenses in the event these assistive devices have already been purchased and installed by or for the Appellant.

G. SUMMARY OF DECISION RELATING TO THE SUPPLEMENTARY ARGUMENTS

In summary, we find with respect to the supplementary arguments that:

1. The Charter

It would be inappropriate for this Commission to deal with the Appellant's Charter arguments. We are of the view that this is not the proper forum to deal with these matters at this time.

2. Appellant's Allegations of Impropriety by the Respondent

There was insufficient evidence brought before this Commission with respect to these allegations. We have not drawn any adverse inferences from the same and based upon the evidence, we have seen nothing untoward in the manner that the Respondent handled the Appellant's case. We are of the view that the Respondent and its personnel have handled the Appellant's case in a compassionate manner.

As a result of the foregoing, this Commission finds that the internal review officer's decision dated September 13, 2004, is hereby modified accordingly. In addition, as specified in Section D of this Decision, we retain jurisdiction with respect to certain issues and either party may upon reasonable notice refer those matters to this Commission for final determination.

Dated at Winnipeg this 22nd day of February, 2006.

GUY JOUBERT

MARY LYNN BROOKS

PAUL JOHNSTON