Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-88

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Dr. Patrick Doyle** **Ms Deborah Stewart**
APPEARANCES:	**The Appellant, [text deleted], was represented by Mr. Bob Sample of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.**
HEARING DATE:	**April 5, 2006, January 17, 2007 & March 26, 2007**
ISSUE(S):	**1. Does the medical evidence support the decision that further physiotherapy treatment is no longer required, effective April 7, 2004?** **2. Does the medical evidence support chiropractic treatment to April 30, 2004?**
RELEVANT SECTIONS:	**Sections 136(1)(a) and 138 of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Sections 5(a) and 10(1)(e) 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

Motor Vehicle Accident – June 25, 2003

[The Appellant] was involved in a motor vehicle accident on June 25, 2003 and suffered motor vehicle accident injuries. As a result of these injuries, the Appellant suffered ongoing complaints to his neck, back, thoracic regional pain, upper limb pain, lower right hip pain as well as sleep disturbance, fatigue, and dizziness. In respect to these injuries he was treated by a

physiotherapist whose costs were funded by MPIC. At the time of the motor vehicle accident the Appellant was self-employed [text deleted] and although he did not miss any time at work as a result of the motor vehicle accident, he testified at his appeal hearing that the motor vehicle accident injuries adversely affected his ability to perform his work and his quality of life.

[Text deleted], the Appellant's physiotherapist, provided a report dated March 16, 2004. In this report a diagnosis of C5-C6 posterlateral disc herniation was provided and the Appellant's medical problems were described as:

> Csp [cervical spine] pain with [reduced] ROM [range of motion], muscle tightness and strain throughout the C/T jct. [cervical-thoracic junction]. Intermittent L [left] upper extremity pain [and] numbness . . .

[Appellant's physiotherapist] also requested MPIC fund physiotherapy treatments in his report dated March 16, 2004 wherein he stated:

> Making formal application for an extension of treatment. …pt. [patient] continues slow gradual progress …. Now increased activity levels and exercise thresholds.

On March 22, 2004 MPIC's case manager requested [text deleted], MPIC's chiropractic consultant, to review the Appellant's medical file and advise whether further physiotherapy treatments were medically required in relation to the injuries sustained in the motor vehicle accident of June 25, 2003.

On March 29, 2004 [MPIC's chiropractor], in his report, stated:

> After reviewing the information on file, there is no convincing evidence to suggest that additional physiotherapy care, as outlined by [Appellant's physiotherapist], has a reasonable expectation of providing further sustainable therapeutic benefit.

> To date, the claimant had had approximately 40 physiotherapy interventions and should be sufficiently educated in appropriate home management strategies. I would suggest that with a short course of additional chiropractic care until the end of April, this claimant should be at or very near his maximum therapeutic benefit.

Case Manager's Decision - April 1, 2004

On April 1, 2004 the case manager wrote to the Appellant and stated:

> We have reviewed your entitlement to further physiotherapy care following [Appellant's physiotherapist's] Progress Report of March 16, 2004.
>
> That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information does not provide any evidence to suggest that additional physiotherapy will provide any further sustainable therapeutic benefit to you. As this form of treatment is no longer medically required, we will not fund additional physiotherapy effective April 7, 2004.
>
> As outlined in our letter of February 18, 2004, we will continue to fund chiropractic treatments to April 30, 2004, at which time you should be at or near your maximum therapeutic benefit.

The case manager further stated that her decision was based on Section 5(a) of Manitoba Regulation 40/94.

The Appellant made Application to Review the case manager's decision on April 10, 2004.

Internal Review Officer's Decision

In a letter to the Appellant dated April 28, 2004 the Internal Review Officer wrote to the Appellant confirming the case manager's decision and dismissing the Application for Review. The Internal Review Officer stated:

> On March 16, 2004, [Appellant's physiotherapist], provided a follow-up report which was reviewed by [MPIC's chiropractor]. [MPIC's chiropractor] documented the file on March 24, 2004 noting you had received approximately 40 physiotherapy interventions to date. He states "there is no convincing evidence to suggest that additional physiotherapy care, as outlined by [Appellant's physiotherapist], has a reasonable expectation of providing further sustainable therapeutic benefit."

Pursuant to the advice the Appellant received from his caregivers he continued with physiotherapy at his own cost.

Notice of Appeal

The Appellant filed a Notice of Appeal to this Commission dated May 25, 2004. In this Notice of Appeal the Appellant indicated that he was improving a lot because of the physiotherapy treatments but he had not recovered from the motor vehicle accident injuries and required further physiotherapy treatments.

Motor Vehicle Accident – November 20, 2004

Prior to the Appellant's appeal being heard by the Commission the Appellant was unfortunately involved in a second automobile accident on November 20, 2004 and suffered injuries in that accident. MPIC approved physiotherapy treatments in respect of these injuries.

At the request of the case manager [text deleted], Medical Consultant to MPIC's Health Care Services, reviewed the Appellant's medical file and provided an Inter-departmental Memorandum to the case manager dated April 11, 2005 and stated:

> Information obtained from [Appellant's physiotherapist's] March 29, 2005 report was reviewed.
>
> [The Appellant] has been noted to have regained full function and is performing his full work duties. It is my opinion he will likely experience further improvements if he remains compliant with his home-based exercise program. It is my opinion that passive supervised treatment interventions are not a medical requirement in the management of the conditions he might have developed secondary to the incident in question.
>
> Based on the information provided, in conjunction with that previously reviewed, it is my

> opinion [the Appellant] does not require any further supervised treatment interventions to address the medical conditions he might have developed secondary to this incident in question.

Case Manager's Decision dated April 15, 2005

On April 15, 2005 the case manager wrote to the Appellant and stated:

> This is in response to your physiotherapist [Appellant's physiotherapist's] request for further treatment as outlined in his treatment plan report dated March 29, 2005.
>
> That report, as well as your entire medical file, has been reviewed by our Health Care Services Team. The medical information on file indicates that further supervised treatment interventions are not a "medical necessity". Therefore, Manitoba Public Insurance will not consider the cost of any further treatments as of the date of my telephone call of April 7, 2005.

The case manager further advised the Appellant that he was basing his decision on Section 5(a) of Manitoba Regulation 40/94.

The Appellant, pursuant to the advice received from his caregivers, continued to receive physiotherapy treatment at his own cost subsequent to April 7, 2005.

Appeal

The relevant provisions in respect of this appeal are Sections 136(1)(a) and 138 of the MPIC Act, Section 5(a) and 10(1)(e) of Manitoba Regulation 40/94.

> **Reimbursement of victim for various expenses**
> **136(1)** Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;

Manitoba Regulation 40/94:

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

(a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;

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.

Manitoba Regulation 40/94:
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:

. . .
(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.

Appeal Hearing April 5, 2006

The appeal hearing commenced on April 5, 2006 and the Appellant was represented by Mr. Bob Sample of the Claimant Adviser Office and Ms Dianne Pemkowski represented MPIC.

The Appellant testified that:

1. he was self-employed as the Director of Operations for [text deleted]. His employment was of a sedentary nature which required him to sit at a desk for long periods of time, to use a computer and that his work required a great deal of

concentration.

2. the only way he was able to continue with his employment and be productive was to continue to receive ongoing physiotherapy treatments and that without these treatments he would not be able to continue to work and his quality of life would suffer. He testified that the physiotherapy treatments reduced pain to his neck and back and permitted him to function.
3. without physiotherapy his physical condition deteriorated and he was not able to perform his work.
4. physiotherapy treatments reduced his hand and arm numbness and his pain.
5. without ongoing physiotherapy treatments his quality of life would suffer and he would not be able to continue to work.

MPIC did not call any evidence at this appeal hearing.

Prior to the submission of argument by the parties, the Commission, pursuant to Section 183(4) of the MPIC Act, advised the parties that it was necessary and/or advisable to obtain an expert medical opinion:

1. as to whether physiotherapy was an appropriate treatment to continue with respect to the pain, discomfort and loss of function the Appellant complained about and whether the treatment related to the Appellant's motor vehicle accident of June 25, 2003.
2. whether radio frequency neurotomy was an appropriate procedure to resolve the Appellant's ongoing cervical pain and numbness symptoms.
3. whether any other treatment was appropriate.

The Commission requested [independent orthopaedic surgeon] to examine the Appellant and to

provide a medical report in respect of these issues.

On April 11, 2006 [text deleted], the Appellant's physiotherapist, provided a report to the Claimant Adviser which stated in part:

> **Treatment April 7th, 2004 - November 20th, 2004**
>
> The treatment provided included orthopedic manual therapy techniques (mobilization, stretches, myofascial release, manipulation, segmental manual traction, soft and connective tissue massage, acupuncture, cryothyerapy, thermotherapy and exercise therapy). The obvious purpose of all treatments is to decrease pain and inflammation, increase spinal range of motion and strength, restore function and decrease nerve pressure. All of the above listed treatments did result in these changes in [the Appellant's] injuries albeit to a lesser degree because of his "fragmented care". Progress was not always serial but fluctuant; however there was an overall progress in that his injuries did not significantly regress as his function increased. (underlining added)
>
> The findings [the Appellant] presented with during the time frame of **April 7th, 2004 – November 20th, 2004** were related to his June **25th, 2003** motor vehicle accident therefore the subsequent treatment was directed at treating these findings.

[Independent orthopaedic surgeon] provided a medical report to the Commission dated July 4, 2006. Prior to providing this medical report [independent orthopaedic surgeon] had received all of the relevant medical reports on the Appellant's MPIC file. He had personally examined the Appellant on July 4, 2006. [Independent orthopaedic surgeon] obtained a medical history from the Appellant in respect of the injuries the Appellant received in the motor vehicle accident and was aware that the Appellant had received multiple physiotherapy treatments, chiropractic treatments, acupuncture treatments, and as well, a cervical neurotomy over the past few years. [Independent orthopaedic surgeon's] report stated:

> The physiotherapy has helped significantly in a temporary fashion. Its effect, which includes a fascial release, lasts anywhere from 2 hours to 24 hours. Chiropractic treatment also helps temporarily over the same time period as well as acupuncture.

In respect of the Appellant's clinical examination [independent orthopaedic surgeon] stated:

> . . . He has trigger points in the right posterior trapezius and in the right scalene area. This causes irritation going down into the rhomboids from the trapezius and from the scalenes down into the anterior chest. . . . He has some cracking sensations at the anterior ribs, but he is not tender there today. He has full range of motion of the neck, thoracic, and lumbar spine today. . . . He has occasional intermittent numbness into the middle fingers of his hand, which I think are a product of radiation from his neck and possibly thoracic outlet syndrome. Adson test today is mildly positive, as was the claudication test with the arm in abduction external rotation and squeezing and releasing the hand. This caused numbness more on the right hand than the left.

[Independent orthopaedic surgeon] further stated in his report:

1. Physiotherapy after April 7th, 2004 and after April 07/2005 provided temporary relief enabling him to perform his job, which he otherwise would not have been able to perform. I think that these treatments were justified at the time, although he seemingly did not make fast progress with his condition. Over time, however, he has improved to the point where he now feels that he can gradually wean off physiotherapy after a concentrated course of sessions over the next little while. (underlining added)

2. The numbness, I think, is related to the motor vehicle accident, is likely related to thoracic outlet syndrome, and regional myofascial pain.

3. Physiotherapy is an appropriate treatment in this case since he does get sustained benefit in relieving his pain discomfort and loss of function. This treatment is related to June 25th, 2003 motor vehicle accident. (underlining added)

4. Radiofrequency neurotomy is an appropriate procedure for the ongoing cervical pain and numbness; however, the patient is not feeling that he wants to go down this because of the side effects of localized skin numbness.

He feels he gets similar benefit from physiotherapy and wants to continue his sustained fashion with physiotherapy over the next six months followed by gradual termination and a home out patient program.

In summary, [independent orthopaedic surgeon] indicated that physiotherapy treatments provided to the Appellant after April 7, 2004 and April 7, 2005 provided temporary relief enabling the Appellant to perform his job which he would otherwise not be able to perform. [Independent orthopaedic surgeon] further stated in his report that physiotherapy was an

appropriate treatment in respect of the Appellant since the Appellant received sustained benefit relief from his pain, discomfort and loss of function.

MPIC provided [independent orthopaedic surgeon] with a report from [text deleted], MPIC's chiropractic consultant. In response, [MPIC's chiropractor] provided an Inter-Departmental Memorandum to MPIC's Internal Review Officer dated September 6, 2006 in which he stated that a short extension of physiotherapy in order to ensure that the Appellant was performing his outpatient exercise correctly would not be unreasonable. As a result, the Internal Review Officer wrote to the Appellant on November 20, 2006, and based on [MPIC's chiropractor's] Inter-departmental Memorandum, advised the Appellant that MPIC was extending his entitlement for funding for supportive physiotherapy treatments for the period between April 1, 2005 and September 30, 2005.

In response, the Claimant Adviser advised the Commission that he wished the appeal hearing be reconvened in order to determine whether the Appellant was entitled to reimbursement for physiotherapy treatments for the following periods:

a) April 7, 2004 to November 20, 2004
b) two additional treatments in the month of November 2005
c) one additional treatment in the month of December 2005 and
d) chiropractic treatments subsequent to September 2005.

As well, the Claimant Adviser advised the Commission that he would be seeking a decision from the Commission that the Appellant be awarded the six (6) month program recommended by [MPIC's chiropractor] to ensure that the Appellant was able to develop and sustain an effective home management program.

Appeal Hearings – January 17, 2007 and March 26, 2007

The Commission reconvened on January 17, 2007 and, as a result of discussions with both the Claimant Adviser and MPIC's legal counsel, the Commission requested written submissions from both parties. The Commission received written submissions from both parties and reconvened the appeal hearing on March 26, 2007. At the appeal hearing the Appellant again testified in support of his request for further funding for physiotherapy treatments and stated that:

1. after September 30, 2005 he discontinued his physiotherapy treatments but continued at his own expense to receive chiropractic treatments.
2. as a result of his receipt of both the physiotherapy treatments and subsequent chiropractic treatments he has slowly recovered from the injuries he sustained in the motor vehicle accident.
3. as a result of the improvement of his health he no longer requires physiotherapy treatments on a regular basis.
4. without the receipt of the physiotherapy treatments and subsequent chiropractic treatments he would have been unable to continue with his employment due to the motor vehicle accident injuries.

Submissions

Section 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94

The Claimant Adviser, in his submission to the Commission, reviewed his written argument that MPIC had failed to comply with Section 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94 by failing to fund the physiotherapy treatments which the Appellant had received for the periods

(a) April 7, 2004 to November 20, 2004

(b) two (2) additional treatments in the month of November 2005

(c) one (1) additional treatment in the month of December 2005

(d) Chiropractic treatments subsequent to September 2005.

The Claimant Adviser submitted that, having regard to the testimony of the Appellant, the reports of [Appellant's physiotherapist], and the medical opinion of [independent orthopaedic surgeon], physiotherapy treatments were medically required.

In respect of Section 5 of Manitoba Regulation 40/94 the Claimant Adviser, in his written submission, stated:

> **3(a) Section 5: "medically required"**
>
> There are two conditions which must be met before MPI becomes obligated to reimburse a claimant for expenses incurred for medical or paramedical care:
>
> 1. the expenses must have been incurred for treatments directed towards an injury sustained in the accident in accordance with Section 136(1)(a) of the *Act;* and
> 2. the treatment must have been "medically required" in accordance with Section 5 of Manitoba Regulation MR P215-40/94 (copy enclosed).
>
> A review of AICAC decisions concerning the application of s. 5 shows that for treatments to be considered medically required there must be a diagnosis of a bodily injury sustained in a mva, and the medical treatment should result in sustained therapeutic benefit to the injury resulting in either full recovery or a victim reaching maximum therapeutic benefit.

In response, MPIC's legal counsel submitted that:

1. the Appellant was not entitled to reimbursement for physiotherapy treatments for the period April 7, 2004 to November 20, 2004 and for the additional treatments in November 2005 and December 2005, or for any treatments after December 30, 2005,

because the Appellant had reached maximum therapeutic benefit of physiotherapy treatment as a result of the motor vehicle accident and therefore was not entitled to reimbursement of these treatments pursuant to Section 136(1)(a) of the MPIC Act and Section 5(a) of Manitoba Regulation 40/94.

2. these provisions in the Act and Regulations have no application in the factual situation of this appeal since the physiotherapy treatments were not medically required because they did not improve the Appellant's condition.
3. the Appellant, during his testimony, advised that physiotherapy treatments were not long term relief and, as a result, the Appellant did not receive any substantial benefit from these treatments.
4. since the Appellant received no substantial benefit from these treatments, they do not meet the test as set out in Section 136(1)(a) of the MPIC Act and Section 5(a) of Manitoba Regulation 40/94 since there had been no improvement in the Appellant's medical condition.
5. the Commission should reject the Appellant's submission and confirm the Supplementary Review Decision of the Internal Review Officer dated November 20, 2006.

Discussion

The Commission has carefully reviewed the testimony of the Appellant and notes that:

1. the Appellant was self-employed as the Director of Operations for [text deleted], an occupation that did not require any physical labour and was sedentary in nature.
2. he was required, in carrying out his business, to sit at a desk for prolonged periods of time, using a computer, and that his work required a great deal of concentration.
3. in order to be fully productive in his employment on a full time basis, he was required

to receive physiotherapy treatments on a regular basis as a result of the injuries he sustained in the motor vehicle accident.

4. without receiving these treatments his neck and shoulder pain continued and got worse and he was unable to function in his job and in his private life.
5. the physiotherapy treatment reduced hand and arm numbness and prevented the continuation of an increase in his pain levels.

The Appellant, in his testimony, confirmed the statements he made in his written Application for Review of the Internal Review Officer's decision. In this document he stated that without ongoing physiotherapy treatment he would be unable to continue with his employment and treatments were essential for maintaining a decent quality of life.

The Commission finds that the Appellant testified in a clear and convincing fashion and determines that he was a credible witness. The Commission further finds that the Appellant's testimony is corroborated by the physiotherapy reports of [Appellant's physiotherapist], and the independent medical opinion of the Orthopaedic Surgeon, [text deleted]. [Appellant's physiotherapist] confirmed the physiotherapy treatments did assist in improving the health of the Appellant as a result of the motor vehicle accident injuries. [Independent orthopaedic surgeon] found that the physiotherapy treatments were an appropriate treatment and provided sufficient relief to the Appellant to permit him to retain his quality of life and continue his employment.

MPIC recognized that as a result of the motor vehicle accident the Appellant was entitled to receive physiotherapy treatments and initially they funded these treatments. MPIC's initial position to fund the physiotherapy treatments is consistent with [Appellant's physiotherapist's] physiotherapy reports dated March 16, 2004 and April 11, 2006, and [independent orthopaedic

surgeon's] report dated July 4, 2006, and clearly indicate that the physiotherapy treatments provided relief to the Appellant to permit him to retain his quality of life and continue his employment.

In respect of the Appellant's loss of function, the Commission, as well, finds that the medical evidence in the physiotherapy reports of [Appellant's physiotherapist], and the medical report of [independent orthopaedic surgeon], establishes that the physiotherapy treatments were medically required and appropriate because these treatments provided the Appellant with sustained benefit to relieve him from discomfort and loss of function.

The Appellant testified on March 26, 2007 that he substantially recovered from his motor vehicle accident injuries and that he no longer requires, on a regular basis, either physiotherapy treatments or chiropractic treatments. Contrary to the position of MPIC that the physiotherapy treatments provided only temporary relief, the Commission finds that:

1. these physiotherapy treatments provided the Appellant relief from pain (caused by the motor vehicle accident) for a continuous period of time and permitted the Appellant to continue his employment and to enjoy a reasonable quality of life.
2. without receipt of the physiotherapy treatments, the Appellant would not have been able to continue his employment or participate in the normal activities of every day life.
3. these physiotherapy treatments substantially contributed to the Appellant's recovery from his motor vehicle accident injuries to the point where he was able to carry on his employment and participate in normal activities of life without continuous receipt of physiotherapy and chiropractic treatments.

Decision

The Commission therefore determines that, having regard to the reports of [text deleted], the Appellant's physiotherapist, the report of [independent orthopaedic surgeon], and the Appellant's testimony, the Appellant has established, on a balance of probabilities, that the physiotherapy treatments which the Appellant received for the following periods:

a) April 7, 2004 to November 20, 2004

b) Two (2) additional treatments in the month of November 2005

c) One (1) additional treatment in the month of December 2005

were medically required pursuant to Section 136(1)(a) of the MPIC Act and Section 5 of Manitoba Regulation 40/94.

The Commission therefore directs MPIC to reimburse the Appellant for the cost of these physiotherapy treatments as outlined herein between April 7, 2004 and December 2005. As a result, the Commission allows the Appellant's appeal in this respect and, accordingly, rescinds the Internal Review Officer's Decision dated April 28, 2004 and Supplementary Review Decision dated November 20, 2006.

Submissions

Section 138 of the MPIC Act and Section 10(1)(e) of Manitoba Regulation 40/94

In the alternative, the Claimant Adviser submits that reimbursement of the physiotherapy treatments comes within the scope of Section 138 and Section 10(1)(e) of Manitoba Regulation 40/94. The Claimant Adviser, in his written submission, referred to the decision of the Manitoba Court of Appeal in *Menzies v. MPIC et al., (*2005 MBCA 97) and stated:

(b) Section 10(1)(e) "rehabilitation"

i. The decision in *Menzies*

The Manitoba Court of Appeal issued its definitive interpretation of the rehabilitation provisions of s. 138 of the Act in its recent decision *Menzies (Menzies v. MPIC et al.,* 2005 MBCA 97). It states:

> [para. 31] Section 138 is intended to require MPIC, subject to the regulations under the *Act*, to take any measure which, in its discretion, it considers necessary or advisable, to achieve any one or more of the five objectives set out in the section. The measures are to be taken if, in MPIC's discretion, they are necessary or advisable:
>
> (i) to contribute to the rehabilitation of a victim,
> (ii) to lessen a disability resulting from bodily injury, and
> (iii) to facilitate the victim's return to a normal life or
> (iv) [to facilitate the victim's] reintegration into society or
> (v) [to facilitate the victim's reintegration into] the labour market.
>
> [para. 33] … [I]t is clear that s. 138 is (but "[s]ubject to the regulations") intended to vest MPIC with a considerable discretion, not only in respect of matters that will contribute to rehabilitation, as set out in the objective identified as (i) in para. 31 but considerably beyond. The other objectives of s. 138 (ii through v) describe additional circumstances which may prompt action from MPIC. These further objectives are, of course, encompassed within the concept of "rehabilitation" in a broad sense. …
>
> [para. 34] … S. 138 stands as a very broad provision vesting MPIC with power, but exercisable only if MPIC considers it necessary or advisable to exercise that power, to do whatever would advance the objectives in the section in any particular case. [The Court of Appeal found that] the word "and" found after "bodily injury" and before "to facilitate" should be understood as disjunctive so that measures may be taken if they achieve any one or more of the goals set out in s. 138. For example, a measure may be taken if it lessens a disability even though it does not facilitate the victim's reintegration into the labour market. …
>
> [para. 35] The presence in s. 138 of stated objectives going beyond "rehabilitation" suggests a legislative intent to assist victims in their recovery in a more extensive way than as specifically delineated in s. 10, which appears by its opening words to be confined to only the first objective in s. 138 ("to contribute to the rehabilitation of a victim"). …

The Court commented that;

> [para. 48] In 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.

> This clearly establishes the scope of s. 138 as sufficient to support treatment that may not be "medically required", but is a valid rehabilitative measure.

The Claimant Adviser, in his written submission, further asserted that the Commission's decision in [text deleted] (AICAC# AC-04-82) supported the Appellant's position that supportive physiotherapy treatment may be funded pursuant to Section 138 of the MPIC Act and Section 10(1)(e) of M.R. 40/94 and stated:

> [the Appellant] received extensive injuries in a mva, August 12, 1995. Once his injuries had stabilized [the Appellant] continued to receive physiotherapy treatments at a frequency of once every two to three weeks. Following an opinion by MPIC's Health Care Services physician that such treatment would not assist in improving the Appellant's health, in that the treatment was intended only for symptom modification and the alteration of pain, the case manager terminated funding for physiotherapy treatment. With the support of his caregivers, [the Appellant] sought review of the decision.
>
> On review, the Internal Review Officer decided that [the Appellant] was entitled to supportive physiotherapy once every three weeks as a rehabilitative treatment pursuant to s. 138 of the *Act* and s. 10(1)(e) of MR 40/94. She stated:
>
> > Section 10(1)(e) of Manitoba Regulation 40/94 allows us to extend coverage for an expense associated with "occupational, educational or vocational rehabilitation" where "the corporation considers it necessary or advisable". Neither [MPIC HCS consultant physicians] [text deleted], has any particular quarrel with the proposition that occasional physiotherapy "tune-ups" are "reasonable" given your circumstances. (I construe the term "reasonable" in this context to be synonymous with "advisable".) Accordingly, I think you do have coverage for … intermittent physiotherapy … (p. 9)
>
> . . .
>
> [The Appellant] appealed, arguing his condition required more frequent treatment. The Commission awarded [the Appellant] the more frequent treatment recommended by his caregivers. First, the Commission accepted [the Appellant's] testimony that
>
> 1. he required physiotherapy treatments once every two weeks rather than every three weeks in order to reduce the pain to his neck, back, shoulders and arms which assists him in maintaining his productivity at work and his quality of life.
> 2. physiotherapy treatments every two weeks rather than every three *weeks* was more effective in achieving both his vocational and personal goals. (p. 12-13)

Second, the Commission agreed with the Internal Review Officer that supportive treatment was appropriate and increased the frequency stating:

> The Internal Review Officer accepted [text deleted] opinion [the Appellant's physiotherapist] that the Appellant's functional capacity deteriorates between courses of physiotherapy but rejected [Appellant's physiotherapist's] recommendation that the tolerance was approximately two to four weeks between treatments. ... [T]he Commission finds that the Internal Review Officer had no objective basis to reject [Appellant's physiotherapist's] opinion that these treatments should occur every two-four (2-4) weeks and to substitute his own judgment in respect as to the frequency of treatments. The Commission determines that the Internal Review Officer, in arriving at his decision, failed to give sufficient weight to the professional judgment of [Appellant's physiotherapist], who had personally examined the Appellant and determined the frequency of the Appellant's need for physiotherapy treatments. … The Commission also finds that in arriving at his decision the Internal Review Officer did not appear to have considered the medical opinion of [text deleted], the physiatrist, nor the opinions of [Appellant's doctor #1] or [Appellant's doctor #2]. (p. 13)

The Commission noted in particular, the opinion of [Appellant's physiatrist], who said of [the Appellant's] treatment, which at the time included physiotherapy once a week, that it was "*appropriate and reasonable ... [and continuing) his current maintenance treatment would be reasonable."* (p. 14)

The Commission also ordered that MPIC reimburse [the Appellant] pursuant to the same provisions, for the cost of a gym membership required in order to permit [the Appellant] to undertake prescribed strengthening exercise on machines not available at home.

Whether supportive physiotherapy treatment was properly funded as a rehabilitative measure pursuant to s. 138 and s. 10(1)(e) was not in dispute in this appeal.

The Claimant Adviser further stated in his written submission, in respect of [text deleted] *(*supra), that:

> This decision clearly and decisively shows that supportive physiotherapy treatment can be funded pursuant to s. 138 and 2. 10(1)(e) where it is:
>
> - appropriate;
> - reasonable (advisable);
> - recommended by the attending physiotherapist;
> - supported by attendant caregivers, (Which might include specialists, physicians and chiropractors);

- required to reduce pain in order to assist a claimant in maintaining productivity at work and maintaining quality of life;
- effective in assisting a claimant to achieve both vocational and personal goals.

In [text deleted], the Internal Review Officer exercised MPIC's discretion under s. 138 and s. 10(1)(e) of MR 40/94 and decided that supportive physiotherapy treatment, which reduced escalating pain levels and improved deteriorating function levels allowing the victim to remain working, was reasonable and advisable. The Commission agreed with that exercise of discretion.

Submission of MPIC

Section 138 of the MPIC Act and Section 10(1)(e) of Manitoba Regulation 40/94

MPIC's legal counsel, in her written submission, stated:

> When looking at Section 10(1)(e) of Manitoba Regulation 40/94, it clearly does not apply to the factual situation in this appeal because it talks about returning the victim as nearly as practicable to his or her condition before the accident whereas we know that the physiotherapy benefits are not improving [the Appellant's] condition.
>
> The basis for the Appeal must be for maintenance treatments versus treatments that are medically required under Section 5 of Manitoba Regulation 40/94 because the preponderance of the medical evidence on this file is that physiotherapy benefits are not medically required in [the Appellant's] case. I am of course using the wording of Section 5 when using the term medically required.
>
> As a result, neither Section 5 nor Section 10(1)(e) of Manitoba Regulation 40/94 could apply to [the Appellant's] situation in providing him reimbursement for physiotherapy treatments for the dates outlined above.
>
> We must then turn to Section 138 of The MPIC Act. The Commission did not have to consider whether Section 138 or Section 10(1)(e) of Manitoba Regulation 40/94 applied in the [text deleted] case because the Internal Review Officer had already applied it. As a result, that case cannot be relied upon to argue that AICAC has decided this issue.
>
> As well, in the [text deleted] case, there was a great deal of evidence from the Claimant and from Health Care Practitioners that the Appellant could not have continued to work without these benefits. This is not the case with [the Appellant]. In fact, there are many comments on the file that he was not going to physiotherapy as much as he should have because his work was interfering with his ability to attend for treatments. As well, despite the fact that he was told that there would be no funding for physiotherapy benefits from Manitoba Public Insurance, he continued to attend for treatment. [The Appellant] has not been without treatment to the extent that he could say his condition would have deteriorated from April to November of 2004 without physiotherapy. This would only be speculation on his part. It is interesting that despite

> his belief that his condition would deteriorate, many times he chose not to attend for treatment because of work responsibilities.
>
> During his testimony, [the Appellant] advised that there was not long term relief with physiotherapy benefits and by the next afternoon, it was back. It cannot be said that 24 hour relief from physiotherapy benefits when an individual seeks out 22 treatments from April 7 to November 20, 2004 would provide any substantial benefit. Mr. Sample on page 6 of his Submission states that supportive physiotherapy treatment can be funded pursuant to the above noted sections where it is "required to reduce pain in order to assist a Claimant in maintaining productivity at work" and "maintain quality of life and effective in assisting a Claimant to achieve both vocational and personal goals". These 22 treatments cannot meet these tests as set out by Mr. Sample because they provided 24 hours of relief.
>
> In conclusion, [the Appellant] testified that he only received very temporary relief with physiotherapy benefits. This offers no substantial benefit and should not be considered maintenance benefits. These benefits do not meet the test required under Section 138 as rehabilitation treatments due to this reason. These benefits are also not medically required as [the Appellant's] condition was not improving and they therefore fail the test found in Section 5 of Manitoba Regulation 40/94. The benefits also do not meet the requirements of Section 10(1)(e) of Manitoba Regulation 40/94 because [the Appellant's] condition did not improve with these treatments for the times at issue on this Appeal. Therefore, it is the position of MPI that [the Appellant's] physiotherapy treatments at issue on this Appeal are not rehabilitative and should not be funded.

The Commission has determined that the physiotherapy treatments that the Appellant received as a result of the motor vehicle accident injuries were medically necessary in order to permit the Appellant to continue his employment and to participate in the normal activities of every day life and, as a result, rejects MPIC's submission in this respect.

The Commission acknowledges that the Appellant did receive numerous physiotherapy treatments over a long period of time but the Commission finds that these treatments provided not merely a temporary benefit, but a sustained benefit, to the Appellant relieving him of his pain, discomfort and loss of function and permitted him to continue his employment and to enjoy the normal activities of every day living. [Independent orthopaedic surgeon], in his medical report to the Commission dated July 4, 2006 stated:

1. Physiotherapy after April 7th, 2004 and after April 07/2005 provided temporary relief enabling him to perform his job, which he otherwise would not have been able to perform. I think that these treatments were justified at the time, although he seemingly did not make fast progress with his condition. Over time, however, he has improved to the point where he now feels that he can gradually wean off physiotherapy after a concentrated course of sessions over the next little while. (underlining added)

. . .

3. Physiotherapy is an appropriate treatment in this case since he does get sustained benefit in relieving his pain discomfort and loss of function. This treatment is related to June 25th, 2003 motor vehicle accident. (underlining added)

The Appellant testified at the appeal hearing on March 26, 2007 and stated:

1. after September 30, 2005 he discontinued his physiotherapy treatments but continued at his own expense to receive chiropractic treatments.
2. as a result of his receipt of both the physiotherapy treatments and subsequent chiropractic treatments he has slowly recovered from the injuries he sustained in the motor vehicle accident.
3. as a result of the improvement of his health he no longer requires physiotherapy treatments on a regular basis.
4. without the receipt of the physiotherapy treatments and subsequent chiropractic treatments he would have been unable to continue with his employment due to the motor vehicle accident injuries.

The Commission has determined that the Appellant testified in a clear and convincing fashion, that his testimony was credible, and is accepted by the Commission. This testimony is corroborated by the medical report of [independent orthopaedic surgeon] who opined that the physiotherapy treatments substantially contributed to improving the health of the Appellant

and permitted the Appellant to perform his job and participate in normal everyday activities which otherwise he would not have been able to do.

The Commission therefore determines that, pursuant to Section 138 of the MPIC Act, and Section 10(1)(e) of Manitoba Regulation 40/94, that in respect of the motor vehicle accident injuries the Appellant sustained physiotherapy treatments did:

(a) contribute to his rehabilitation;

(b) lessened his disability resulting from the motor vehicle accident injuries by relieving him from his pain discomfort and loss of function;

(c) permitted him to return to a normal life;

(d) permitted him to participate in the regular daily activities in society; and

(e) permitted him to continue to be employed in his pre-accident employment.

Decision

The Commission therefore concludes that the Appellant has established, on a balance of probabilities, that MPIC erred in failing to exercise its discretion under Section 138 of the MPIC Act and Section 10(1)(e) of Manitoba Regulation 40/94 to reimburse the Appellant for the cost of the physiotherapy treatments he incurred:

(a) April 7, 2004 to November 20, 2004

(b) two (2) additional treatments in the month of November 2005

(c) one (1) additional treatment in the month of December 2005

As a result, the Commission finds that contrary to the provisions of Section 138 of the MPIC Act and Section 10(1)(e) of Manitoba Regulation 40/94, MPIC erred in failing to reimburse the

Appellant for these physiotherapy treatments. The Commission therefore directs MPIC to reimburse the Appellant for the physiotherapy treatments he has claimed between the period April 7, 2004 and December 30, 2005. Accordingly, the Commission rescinds the Internal Review Officer's Decision dated April 28, 2004 and Supplementary Review Decision dated November 20, 2006 and allows the appeal in this respect.

Chiropractic Treatments after September 30, 2005

The Appellant testified that subsequent to September 30, 2005, he discontinued his physiotherapy treatments and continued at his own expense to receive chiropractic treatments. The Commission notes that the issue of the Appellant's appeal relates to physiotherapy treatments and not to chiropractic treatments. The Appellant did not receive a decision of the Internal Review Officer respecting a claim for chiropractic treatments and therefore did not file an appeal for non-payment of these treatments by MPIC to the Commission. Accordingly, this Commission has no jurisdiction to deal with the Appellant's request for the reimbursement of chiropractic treatments after September 30, 2005 and therefore dismisses the Appellant's request for reimbursement of chiropractic treatments.

Six (6) Month Program

During the course of the appeal hearing the Claimant Adviser advised the Commission that he would be seeking a decision from the Commission that the Appellant be awarded the six (6) month program recommended by [MPIC's chiropractor] to ensure that the Appellant was able to develop and sustain an effective home management program. The Appellant testified at the appeal hearing on March 26, 2007 that he had substantially recovered from the motor vehicle accident injuries and the Commission finds that, having regard to the effluxion of time, the

Appellant, at present, is not required to participate in a six (6) month program recommended by [MPIC's chiropractor] in order to ensure the Appellant was able to develop and sustain an effective home management program. For this reason the Commission rejects the Claimant Adviser's request in this respect.

Dated at Winnipeg this 31st day of May, 2007.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

DEBORAH STEWART