

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by D.M.
AICAC File No.: AC-07-81**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Diane Beresford
Ms Sandra Oakley

APPEARANCES: The Appellant, D.M., was represented by Ms Candace Everard;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: July 28, 2008

ISSUE(S): Entitlement to reimbursement of expenses from Personal Injury Protection Plan benefits pursuant to Section 138 of the Manitoba Public Insurance Corporation Act:

- Attendant travel expenses to non-medical/rehabilitation appointments or outings, including trips to [Text deleted], Ontario;
- Admission fees of [D.M.'s] attendants to recreational activities such as movies, professional sporting events, bowling and YMCA;
- Mileage and parking expenses incurred by family members for non-medical/rehabilitation appointments or outings including trips to the Society for Manitobans with Disabilities, or woodworking workshops;
- Cancellation fees for flight to [Text deleted], Ontario that [D.M.] and his attendant were scheduled to take but cancelled on doctor's recommendations for medical reasons.

RELEVANT SECTIONS: Section 138 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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

Reasons For Decision

The Manitoba Court of Appeal in its decision, *D.M. v. MPIC et al*, 2005 MBCA 97, stated in respect of the Appellant's background that he was:

. . . seriously injured in a motor vehicle accident in 1994. He had previously been employed as a professional engineer. As a result of the accident, he now functions intellectually at about a Grade 4 level, and will require 24-hour supervision and care for the rest of his life. MPIC and the Winnipeg Regional Health Authority share the cost.

Since his injury, [D.M.] has received benefits under Part 2 of the *Act* (the Personal Injury Protection Plan, or PIPP). Amounts spent and provisions for future payments on his behalf exceed seven million dollars.

[D.M.] will never be able to return to his pre-accident condition, nor will he ever be able to work in any capacity. He can, however, participate in certain activities such as bowling, golf and attending movies and football games.

For eight years after the accident, MPIC reimbursed [D.M.] for travel expenses relating to non-medical appointments and recreational events, including the costs for a family member or attendant to accompany him. Then, in 2002, MPIC wrote to [D.M.'s] father stating:

... Beginning September 1, 2002, we are unable to consider travel expenses or entrance fees to/from football games, hockey games, movie theatres, bowling alleys as well as lunches for aide's [*sic*] who accompany [D.M.] on these outings. These costs do not fall within the coverage available under the Manitoba Public Insurance Corporation Act and Regulations.

The Appellant's Application for Review was rejected by an Internal Review Officer who found that Section 138 of the MPIC Act had no application to the Appellant's request for reimbursement of expenses that he was claiming. The Appellant appealed to the Commission who determined that, pursuant to Section 138 of the MPIC Act, MPIC was required "*to consider on the merits whether [the] request is advisable and necessary in the particular circumstances of the case.*"

The Manitoba Court of Appeal's decision dated September 13, 2005 determined that MPIC must consider whether to exercise its discretion under Section 138 of the MPIC Act to reimburse the Appellant for rehabilitation expenses that did not fall within Section 10(1) of Manitoba Regulation 40/94. As a result, the Appellant's claim for reimbursement of his expenses was sent back to MPIC's case manager for determination.

Case Manager's Decision

On May 12, 2006 an MPIC case manager wrote to the Appellant's father and indicated that MPIC was rejecting the following expenses which the Appellant submitted:

1. Attendant travel expenses to non-medical/rehabilitation appointments or outings, including trips to [Text deleted], Ontario.
2. Admission fees of [D.M.'s] attendants to recreational activities such as movies, professional sporting events, bowling and YMCA.
3. Mileage and parking expenses incurred by family members for non-medical/rehabilitation appointments or outings including trips to the Society for Manitobans with Disabilities, or woodworking workshops.
4. Cancellation fees for flight to [Text deleted], Ontario that [D.M.] and his attendant were scheduled to take but cancelled on doctor's recommendations for medical reasons.

The case manager concluded that the expenses claimed on the whole did not come within Section 138 of the MPIC Act and rejected the request for reimbursement of the expenses made by the Appellant.

The Appellant filed an Application for Review of the case manager's decision on June 26, 2006.

Internal Review Officer's Decision

On April 18, 2007 the Internal Review Officer issued a decision rejecting the Appellant's Application for Review and confirming the decision of the case manager.

The Appellant filed 3 Notices of Appeal in respect of the Internal Review Officer's decisions.

The Appellant's counsel, in a written submission to the Commission dated July 17, 2007, summarized the request for reimbursement of expenses by MPIC as follows:

- (a) cost of bus tickets used by [D.M.'s] attendants to accompany him on all outings. [D.M.] pays for his own bus tickets. To date, [D.M.] has submitted receipts for bus tickets purchased for the period from September 1, 2002 to October 31, 2005;
- (b) cost of airfare for [D.M.'s] attendants to accompany him to [Text deleted], Ontario to visit family. [D.M.] pays for his own airfare. To date, [D.M.] has submitted receipts for air fare incurred for the period from November, 2002 to June, 2005. Previously, MPI has paid for air fare for attendants, for seven flights taken between the time of his accident (July, 1994) and June, 2002;
- (c) cancellation fees for both [D.M.] and his attendant relating to a trip to [Text deleted] which was cancelled on a doctor's recommendation in October, 2002;
- (d) cost of entrance or participation fees for [D.M.'s] attendants to accompany him to sporting events, bowling, movies and other activities. Again, [D.M.] pays for his own entrance or participation fees. To date, [D.M.] has submitted receipts for activities attended from August, 2002 through October, 2005, and the expenses from August, 2002 through March 8, 2003 have been paid by MPI, as were expenses incurred prior to August, 2002;
- (e) mileage incurred by [D.M.'s] attendants or family members for attendances at non-medical meetings related to the accident, such as meetings with SMD, ORGOC and legal meetings. To date, [D.M.] has submitted details of mileage incurred from September, 2002 through October, 2005. Previously, MPI has paid for mileage for these items;
- (f) ½ of the mileage incurred by [D.M.'s] family members during [D.M.'s] trips home on weekends, where the mileage is twice what would have been incurred pre-accident because two return trips (one pick-up and one drop-off) are required. To date, [D.M.] has submitted details of mileage incurred from September, 2002 through October, 2005, and the mileage incurred from September, 2002 through March 1, 2003 has been paid by MPI; and
- (g) mileage incurred by [D.M.'s] attendants for attendances at his rehabilitative activities, such as woodworking. To date, [D.M.] has submitted details of mileage incurred from September, 2002 to September, 2005. Previously, MPI has paid for mileage for these items.

In this written submission the Appellant's legal counsel also summarized the reasons for the Internal Review Officer in rejecting the request for compensation as follows:

1. Rehabilitation is a goal-oriented and time-limited proposition, and on or about March 6, 2003, [D.M.] “plateaued” in terms of the enumerated goals set out in s. 138 of The Manitoba Public Insurance Corporation Act (the “Act”). In other words, [D.M.’s] rehabilitation goals were met on March 6, 2003;
2. The phrase “return to a normal life” contained in s. 138 of the Act cannot be construed to mean “return to as normal a life as possible”
3. The report prepared by Karen Thomas, MSW, CCRC is to be disregarded on the bases that Ms. Thomas considered whether the activities for which [D.M.] has claimed reimbursement “have any value”, and that she has not had direct contact with [D.M.] since March, 2003;
4. [D.M.] appears to be able to afford to pay for the items at issue;
5. There is no additional cost to [D.M.] when he and his attendant travel in a taxi or private vehicle together; and
6. The airfare cancellation fee being requested cannot be characterized as achieving or promoting any of the rehabilitation goals referenced in s. 138 of the Act.

Appeal

The relevant provision of the MPIC Act in respect of this appeal is Section 138 which states:

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

At the hearing the Appellant was represented by Ms Candace Everard, and MPIC’s legal counsel was Mr. Morley Hoffman. Neither party called any witnesses.

Submissions

MPIC’s legal counsel, in his submission, stated that the issue before the Commission is whether or not MPIC exercised its discretion reasonably under Section 138 of the MPIC Act in rejecting the Appellant’s Application for Compensation of certain expenses. In his submission Mr. Hoffman made no submission to support the Internal Review Officer’s reasons for her decision in respect of the following matters:

1. The Internal Review Officer's interpretation of the phrase "return to a normal life" contained in Section 138 of the MPIC Act, which cannot be construed as being "returned to as normal a life as possible".
2. That the report of Karen Thomas, MSW CCRC, should be disregarded.
3. The Appellant appears to be able to afford to pay any of the requests he has made for reimbursement.
4. There was no additional cost to the Appellant when he and his attendant traveled in a taxi or private vehicle together.

Mr. Hoffman, however, did submit that MPIC correctly determined the Appellant's medical condition had plateaued in March of 2003 and that the various rehabilitative activities which had been funded up to that time are no longer "necessary or advisable". Mr. Hoffman further argued that MPIC, in relying on the opinion of the psychologist, Dr. Rallo, exercised its discretion reasonably under Section 138 of the MPIC Act in rejecting the Appellant's Application for Compensation. Mr. Hoffman further submitted that in arriving at its decision MPIC relied on Dr. Gill's opinion that there was no scientific evidence to support the Appellant's position that the effects of community outings assisted in the rehabilitation of a person who suffered from a brain injury.

Mr. Hoffman also submitted that the airfare cancellation fee requested by the Appellant could not be characterized as achieving or promoting any of the goals referenced in Section 138 of the MPIC Act.

MPIC's legal counsel therefore submitted that the Appellant's appeal should be dismissed and the Internal Review Officer's decision dated April 18, 2007 be confirmed.

The Appellant's legal counsel disagreed with MPIC's submission and asserted that the Appellant's rehabilitation had not been successfully completed as of March 6, 2003 and referred to a number of reports from the Appellant's caregivers in support of this submission. The Appellant's legal counsel therefore asserted that the Appellant's appeal shall be allowed and the Internal Review Officer's decision rescinded.

Discussion

Dr. Rallo's Report

The Commission agrees with the Appellant's legal counsel's submission that MPIC, in relying on Dr. Rallo's misinterpretation of the comments of Ms Lambert, an occupational therapist, in her report dated March 6, 2003, concluded that the Appellant's rehabilitation had plateaued as of March 6, 2003. Dr. Rallo, in his report dated March 7, 2006, concluded that, upon a review of the Appellant's file and having regard to the five (5) objectives set out in Section 138 of the MPIC Act, after many years of rehabilitation and treatment the Appellant had plateaued in improvement and functioning. In coming to this conclusion, Dr. Rallo specifically referred to Ms Lambert's report where she comments on the Appellant's assessment relating to his rehabilitation. Dr. Rallo quoted Ms Lambert as follows:

[D.M.'s] will have the opportunity to participate in more structured, scheduled activities on a daily basis, with an emphasis on activity that will stimulate him physically, cognitively, socially, and functionally by October 2002.

This goal has been successfully completed. (underlining added)

Dr. Rallo concluded from these comments that as of March 2003 the Appellant's participation in recreational leisure activities and outings have plateaued and rehabilitation goals have been met.

The Commission, however, agrees with the Appellant's legal counsel that Dr. Rallo misinterpreted the comments of Ms Lambert in arriving at his conclusion. A detailed examination of Ms Lambert's report does not support Dr. Rallo's opinion that Ms Lambert had concluded that the Appellant had plateaued in respect of rehabilitation in terms of the enumerated goals set out in Section 138 of the MPIC Act and his condition was not likely to improve. On the contrary, Ms Lambert's report demonstrates that the Appellant had not reached optimal mental and social functioning levels and that his condition continues to improve. In her report, Ms Lambert stated:

Goal/Outcome #3: *[D.M.] will have opportunity to participate in more structured, scheduled activities on a daily basis, with an emphasis on activity that will stimulate him physically, cognitively, socially and functionally, by October, 2002.*

This goal has been successfully completed.

An examination of the comments made by Ms Lambert in her report indicates that the goal to permit the Appellant to have the opportunity to participate in more cognitive and behavioural strategies had begun and this goal of opportunity has been successfully completed. In her report Ms Lambert does not state, directly or indirectly, that the Appellant's rehabilitation had plateaued. To the contrary Ms Lambert in her report proceeds to describe a number of structured and scheduled activities which the Appellant participated in and stated:

. . . [D.M.'s] progress with these activities/behaviors has been monitored on a monthly basis and recommendations have been made to staff to further challenge [D.M.] or to modify programming as difficulties arise. . . (underlining added)

Ms Lambert further stated:

- (a) There had been improvement in various physical activities the Appellant participated in:

Leisure activities have focused on activity to increase his physical activity, including exercise at the gym 2-3 times/week, bowling once a week, walking when the winter weather permits, and other outings in the community that are less sedentary and more active. [D.M.] has been taking the bus, weather permitting in the winter, to and from some social or physical activities, and he participates willingly. He knows where to catch the bus, and where to be let off, when he is returning home. He continues however to require supervision in this area.

- (b) The Appellant demonstrated improvement in respect of home activities:

He has been encouraged to participate in more home activities such as meal preparation, laundry, vacuuming and light housekeeping. He has not demonstrated consistency in his willingness to participate in these activities, and his participation is often dependent on the staff person he associates that particular activity with. He continues to require cuing to initiate these activities. . . . (underlining added)

- (c) In respect of sleep patterns the Appellant has demonstrated improvement:

[D.M.] has also demonstrated an improvement in his sleep patterns since this new schedule has been implemented. He is going to bed between 10:30 and midnight on a consistent basis, average 11:00 pm, which is an improvement from 2 or 3 am this time last year. He will initiate going to bed approximately 25% of the time, and there are less behavioral outbursts when he is cued to go to bed or to turn out his light. He is now averaging 8 hours of sleep at night, and will often wake up on his own in the morning. (underlining added)

- (d) In respect of preparation for daily activities the Appellant has demonstrated improvement:

Staff continue to be encouraged to prepare [D.M.] for the day, by orienting him to the daily activities through his schedule board. Staff have reported occasions, where [D.M.] will communicate choices around activities for the day, and will initiate an indication on the schedule of some of the anticipated activities. (underlining added)

- (e) In respect of integration in society, the Appellant has demonstrated improvement:

[D.M.] is integrating into community activities with the general public as he participates in a regular bowling league. (underlining added)

- (f) In respect of the Appellant's personal care and home management routines, there was room for improvement:

Based on the last 6 months of evaluation, it is anticipated that he will always require cuing to participate in his personal care and home management routine. However, consistency and routine with these activities will be instrumental in reducing behavioral outbursts. (underlining added)

- (g) The Appellant has demonstrated some improvement in respect of hoarding certain items:

. . . (i.e.) he will hoard unsafe items like knives, will steal items in public, will hoard food that will go bad, or will hoard items in his clothing such that he is not able to wear his clothing properly. Initially his hoarding consisted of storing hoarded items in his hip sack, however, it has now progressed to the point that he is hoarding items in the pockets and sleeves of his jacket, so that he is not able to wear his jacket properly. He does not respond well to removal of these hoarded items.

Based on research completed on hoarding, the hoarding behavior may not be able to be eliminated, but has the potential to be more controlled/managed. Using cognitive/behavioral techniques/strategies and environmental modifications, it might be possible to assist [D.M.] in better managing these behaviors and providing him with a sense of control over his environment. (underlining added)

Ms Lambert concluded this report by stating:

ASSESSMENT AND RECOMMENDATIONS

[D.M.] would continue to benefit from Occupational Therapy Services. (underlining added)

Recommendations

1. Continue to provide Occupational Therapy Services.
2. Please see attached goal chart for details of Occupational Therapy goals, action plans and outcomes.

The Commission therefore concludes that Ms Lambert's report does not support Dr. Rallo's conclusion that the Appellant's rehabilitation plateaued and that it was unlikely that any further

recreational or outdoor activities likely improved the Appellant's condition. Ms Lambert's comments demonstrate that the Appellant had successfully commenced to participate in more structured, scheduled activities on a daily basis, and there was the opportunity for improvement in respect of his personal care, home management, sleeping patterns, reintegration into society, and hoarding patterns. Ms Lambert in her report concluded that the Appellant had commenced participating in the structured programs successfully, and hopefully with the proper cognitive/behavioural techniques/strategies and environmental modification, it might be possible to assist the Appellant in better managing his behaviour and providing him with a sense of control over his environment.

The Appellant's legal counsel in her written submission referred to the reports of Tuyet Huynh, Occupational Therapist, Allison Baird, Speech-Language Pathologist, Dr. R.J. Boyd, the Appellant's personal physician, and the report of Karen Thomas, the Appellant's former case manager, in support of the Appellant's position that he had not reached his optimal mental and social function level and that his condition continues to improve. The Appellant's legal counsel in her written submission stated:

1. Rehabilitation – With respect, it is our submission that the conclusion of the Review Office on this issue is correct. Rehabilitation is not necessarily a time-limited proposition, though it is certainly goal-oriented. Rehabilitation goals, however, can change over time.

In her report dated November 22, 2006, (the "Thomas Report") Karen Thomas, [D.M.'s] former case manager references the working definition of "rehabilitation" used by the Canadian Institute of Health Information, as follows:

Rehabilitation is a goal-oriented and **often** time-limited process which enables an individual with impairments and disabilities to identify and reach his/her **optimal** mental, physical and/or social functional level. Rehabilitation provides opportunities to the individual through a client-focused partnership with family, providers and the community, to accommodate a limitation or lack of function. Rehabilitation focuses on abilities and aims to facilitate social integration and independence (emphasis added).

This is the same definition of “rehabilitation” set out by Dr. Rallo in his report to MPI dated May 4, 2006 (sic).

We submit that in many cases, rehabilitation may be time limited. Certain individuals may be rehabilitated to a point where they can be rehabilitated no more, particularly in the case of injuries that do not involve the brain; but that is not the case for [D.M.], as set out herein. As the evidence reflects, [D.M.] has yet to reach his optimal mental and social functional level. In other words, his condition continues to improve.

In the report prepared for MPI by Tuyet Huynh, [D.M.’s] Occupational Therapist, dated July 10, 2006 (the “Huynh Report”), it has been stated that [D.M.’s] tendency to urinate in bed or on the floor at night has decreased, overall, although his tendency to do so increased in the first half of 2006, compared with that previously reported.

The Huynh Report also provides that [D.M.] has improved in his ability to initiate household chores, such as meal preparation, putting dishes away and cleaning up after a meal, which he did not do previously. Further, the Huynh Report provides that [D.M.’s] leisure activities help to keep him reintegrated with the community.

In addition, the Huynh Report provides, with respect to [D.M.’s] speech, that there have been improvements, including [D.M.’s] ability to communicate with others more spontaneously, and his speech becoming clearer.

Attached at Tab 3 is a report prepared by Allison Baird, Speech-Language Pathologist, dated June 26, 2007 (the “Baird Report”), relating to a speech therapy program that [D.M.] began in February, 2007. The report reflects the significant improvement that [D.M.’s] speech has exhibited over the last number of months.

Dr. R.J. Boyd has seen [D.M.] on a regular basis since January, 1996, and in his report dated July 5, 2006 (the “Boyd Report”) he has stated:

In my opinion, there is no doubt that [trips to [Text deleted]] continues to contribute to his rehabilitation. It certainly does lessen his disability, and it certainly helps him to maintain as normal a life as possible integrating him with his family and, in so doing, integrating him with society.

. . . [D.M.’s] attendances at the Society for Manitobans with Disabilities or at woodworking shops are certainly extremely valuable in helping to reintegrate him into society and give him some skills that he may not otherwise acquire. There is no doubt in my mind that all of these activities significantly contribute to [D.M.’s] rehabilitation which, in my opinion, **will be ongoing for the rest of his life**, and also contribute to improving his disability. (emphasis added)

The Thomas Report, at page 4, paragraph 2 also speaks to the likelihood of continued improvement in [D.M.], and in particular provides:

. . . with increased exposure to community, it is likely that [[D.M.'s]] social skills will slowly continue to improve, as they have done so for the past decade. Additionally, . . . his continued participation in community and family contact would help to prevent further disability.

It is clear, in our submission, that [D.M.'s] condition has not “plateaued”, and that MPI should not be permitted to discontinue payment of benefits for the various categories of expenses at issue in this appeal. We submit that as long as [D.M.'s] condition is improving, he is entitled to coverage for the items at issue.

Dr. Rallo, MPIC’s psychological consultant, conducted a paper review in arriving at his decision. On the other hand, Ms Thomas, the Appellant’s case manager, Ms Lambert, the occupational therapist, Tuyet Hunyh, the occupational therapist, Allison Baird, the speech-language pathologist, Dr. R.J. Boyd, the Appellant’s physician, and Dr. Eggertson, the Appellant’s physiologist, all had the opportunity, over a period of time, of personally observing the Appellant and were in a much better position than Dr. Rallo, who had never personally observed the Appellant, to determine whether or not the outings, recreational activities and visits with the family, were benefiting the Appellant and whether or not the Appellant’s rehabilitation had plateaued. For these reasons the Commission gives greater weight to the Appellant’s caregivers and his former case manager than it does to the opinion of Dr. Rallo.

The Commission finds that MPIC erred in exercising its discretion under Section 138 of the MPIC Act as a result of an erroneous finding of facts. The Internal Review Officer relied essentially on Dr. Rallo’s misinterpretation of a report by Ms Lambert in concluding that the Appellant’s rehabilitation had plateaued and, as a result, MPIC rejected the Appellant’s claim for reimbursement of certain expenses outlined in this report. The Commission finds that there is no factual basis upon which Dr. Rallo could conclude that the Appellant’s rehabilitation had plateaued and that activities relating to outings and recreational activities would not likely contribute to his rehabilitation. In relying on Dr. Rallo’s misinterpretation, MPIC incorrectly

terminated reimbursing the Appellant in respect of the expenses relating to the Appellant's activities as outlined in this decision.

The Commission, upon a careful review of the submissions of both legal counsel, and after a review of all of the documentary evidence filed in these proceedings, finds that the Appellant has established, on a balance of probabilities, that there had not been a plateau of the Appellant's rehabilitation as of March 2003 and that MPIC erred in rejecting the Appellant's claim for reimbursement of expenses in respect of certain activities as outlined in this decision on page four (4) paragraphs a to g inclusive.

Dr. Gill's Report

MPIC's legal counsel relied on the report of Dr. Gill in support of their submission. MPIC's case manager had requested Dr. Gill, in a letter dated December 16, 2005, to comment on the rehabilitation benefits of the following activities in respect of which the Appellant sought reimbursement for expenses from MPIC:

- attend movies
- go bowling
- go golfing at the Golf Dome
- attend the Red River Exhibition
- the Museum
- the Zoo
- travel to [Text deleted], Ontario, by [D.M.'s] brother so [D.M.] could visit his sister

The case manager further stated to Dr. Gill:

I would appreciate your comments with respect to whether these activities giving rise to these expenses would be of benefit to [D.M.] in the following context:

- To contribute to the rehabilitation of [D.M.]
- To lessen a disability resulting from [D.M.'s] injury

- To facilitate [D.M.'s] return to a normal life
- To facilitate [D.M.'s] reintegration into society
- To facilitate [D.M.'s] reintegration into the labour market

In response, Dr. Gill wrote to the case manager on January 13, 2006 and stated:

1) Publications. After reviewing your December 16, 2005 correspondence, I conducted a preliminary search of published literature relevant to the topic. However, I could not find a clear line of research in neuropsychology, that assesses the effects of community outings upon longterm outcome from a brain injury. As an example there do not seem to be research projects that have prospectively studied the effects of going to a movie or to the zoo, on longterm outcome, as far as I am aware. There are a few published studies in the fields of recreational therapy, or occupational therapy, which basically discuss the benefits of those two disciplines. (underlining added)

The Commission notes that Dr. Gill indicated that he had conducted a preliminary search of published material and was unable to find any research to support effects of community outings upon long term outcome from a brain injury. The Commission further notes that Dr. Gill did not undertake a thorough examination of literature but only a preliminary search. As a result, the Commission does not give any weight to Dr. Gill's opinion in respect of his comments relating to published literature.

However, Dr. Eggertson, a neurologist who had followed the Appellant for neurological complications since the motor vehicle accident in 1994, provided a report to the Appellant's legal counsel, dated June 15, 2006. In this report Dr. Eggertson referred to the following research paper:

. . . The article below suggests that in patients with traumatic brain injury that the removal of transportation is an independent predictor of worse occupational performance outcomes.

Disabil Rehabil. 2006 May 15;28(9):547-59.

Prediction of long-term occupational performance outcomes for adults after moderate to severe traumatic brain injury.

Devitt R, Colantonio A, Dawson D, Teare G, Ratcliff G, Chase S.

Arthritis Community Research and Evaluation Unit, Toronto, Canada.

PURPOSE: To examine predictors of long-term occupational performance outcomes for adults after moderate to severe traumatic brain injury (TBI). **METHOD:** This study involved analysis of data from a retrospective cohort of adults (N=306) with moderate to severe TBI discharged from a Pennsylvania rehabilitation treatment facility. Extensive pre-injury sociodemographic, injury-severity, post-injury personal (cognitive, physical, affective), post-injury environmental (social, institutional, physical), and post-injury occupational performance (participation in self-care, productivity, leisure activities) data were gathered from hospital records and using in-person interviews. Interviews occurred at a mean time of 14 (range, 7-24) years post-injury. Hierarchical multiple regression analysis was used to investigate determinants of long-term occupational performance outcomes. **RESULTS:** Pre-injury behavioural problems, male gender, post-injury cognitive and physical deficits, and lack of access to transportation were significant independent predictors of worse occupational performance outcomes. **CONCLUSIONS:** The study supports the use of a comprehensive model for long-term outcomes after TBI where pre-injury characteristics and post-injury cognitive and physical characteristics account for the greatest proportion of explained variance. (underlining added)

Dr. Gill, in his letter to the case manager, also commented on the subject of his clinical experience and stated:

2) Clinical Experience. To address your questions on whether recreational activities contribute to “rehabilitation” or lessen disability” or contribute to a “return to a normal life” or “reintegration into society”, I can state that I encourage patients to have community outings in general, to avoid the risks of becoming socially withdrawn, or becoming anxious in public settings, or depressed, etc. We have had patients as an example who are too anxious to eat outside of their home, or who are at risk for developing agoraphobia or depression, or who become so emotionally dependent upon a particular caregiver that they don’t want that person to be away from them. Thus I would feel that “some” community outings are appropriate in preventing these types of risks, and this would be on a longterm basis. However, I must be honest that there is no “scientific” basis for me to provide guidelines on how many outings, or how often, or for how many years, etc. . . . (underlining added)

The Commission finds Dr. Gill’s comments in respect of his clinical experience are consistent with the Appellant’s position in respect of rehabilitation. Dr. Gill, having regard to his clinical experience, encouraged patients to participate in community outings in general in order to avoid

the risks of becoming socially withdrawn, becoming anxious in public settings, and becoming depressed. Dr. Gill has concluded that although there is no scientific basis for recommending these community outings, his clinical experience has demonstrated that such community outings do contribute to the rehabilitation or the lessening of a disability to the return of a patient's normal life or reintegration into society, all of which are encompassed within the provisions under Section 138 of the MPIC Act. The Commission therefore finds that Dr. Gill in his report does support the various opinions of the Appellant's caregivers who have asserted that all of the social and recreational activities in question contribute to the rehabilitation of the Appellant.

Airfare Cancellation Fees

Mr. Hoffman submitted that the airfare cancellation fees requested by the Appellant could not be characterized as achieving or promoting any of the rehabilitation goals referenced in Section 138 of the MPIC Act.

Mr. Hoffman further submitted that the Appellant's rehabilitation had plateaued and that the trips to [Text deleted], Ontario to visit the Appellant's sister and family had no value in terms of rehabilitation.

In response, the Appellant's legal counsel referred to the report of Ms Karen Thomas, dated November 22, 2006. Ms Thomas was a rehabilitation consultant between 2000 and 2003. Subsequently she was the Appellant's case manager and was involved with all medical rehabilitation and community programming in respect of the Appellant. Ms Thomas was asked by the Appellant's legal counsel to comment specifically on whether the Appellant's attendances at non-medical appointments or outings, including trips to [Text deleted], Ontario to visit his

sister and her family, would have any value to the objectives set out in Section 138 of the MPIC Act. In her report Ms Thomas stated:

a) whether [D.M.'s] attendances at non-medical appointments or outings, including trips to [Text deleted], Ontario to visit his sister and her family have any value to the items listed in the numbers paragraphs below:

1) *Contribute to [D.M.'s] rehabilitation:* If the concept of “social integration” found in the definition of rehabilitation provided by MPI is considered “rehabilitation”, then yes, [D.M.'s] attendance at non-medical appointments and outings contributes to his rehabilitation.

[D.M.'s] visit to his sister in [Text deleted] will contribute to his rehabilitation if the goal of this intervention is to develop his family relationship with siblings with the purpose of engendering long-term “natural” supports. It is clear that family support is critical to the long term success of social and community integration. Rehabilitation goals that emphasize inclusion of family are especially important many years post-injury (see studies on long-term supports to families in appendices).

2) *To lessen [D.M.'s] disability* It is unlikely that the trips would lessen his “disability” from a neuropsychological, physical or cognitive perspective at this time. However, with increased exposure to community, it is likely that his social skills will slowly continue to improve, as they have done so for the past decade. Additionally, based on the literature and review of the importance of social relationships in long term prevention of further disability, his continued participation in community and family contact would help to prevent further disability.

3) *To facilitate a return to as normal a life as possible:* Since [D.M.] is unable, due to his level of impairment, maintain employment, he does require activities during the day that will provide him “as normal a life as possible”. If he is not participating in recreational and social outings, there would need to be a day program or other activity in place in order to “normalize” his days. In answer to your question, yes, his participation in activities outside the home does contribute to having as “normal a life as possible

A visit with family is of course “normal” for most of us. [D.M.] does not have the option of having independent vacations; his visit to his sister in [Text deleted] provides as “normal” a vacation opportunity as possible for him.

4) *To facilitate [D.M.'s] reintegration into society:* The literature indicates that social integration is the most important factor for quality of life. It is likely that [D.M.] would benefit from increased outings if possible, especially if he were able to begin volunteering or participating in group programs that were appropriate for his level of disability. While he has sufficient staffing levels, it is unclear from your report if he is participating socially to his maximal capacity.

Once again, his communication and participation with family is the most important factor in ensuring the highest level of community reintegration and maintenance of family support in his care.

The Appellant's legal counsel also referred to the report of Dr. R.J. Boyd, dated July 5, 2006 who stated:

In my opinion, there is no doubt that [trips to [Text deleted]] continues to contribute to his rehabilitation. It certainly does lessen his disability, and it certainly helps him to maintain as normal a life as possible integrating him with his family and, in so doing, integrating him with society.

The Appellant's legal counsel as well referred a report dated June 15, 2006, prepared by Dr. Eggertson, a neurologist, who has followed the Appellant for neurological complications since 1994. The Appellant's legal counsel, in her written submission, stated:

Among other things, Dr. Eggertson has stated:

From my experience with other patients with brain injuries if normal day-to-day activities are disrupted or omitted then the patients (sic) has a very good chance of declining in terms of his or her functional status. At the very least these activities would keep [D.M.] at the same level of functioning with an opportunity to further improve. It would also allow him to have as normal life as possible.

Dr. Eggertson has further referenced an article which suggests that:

. . . in patients with traumatic brain injury . . . the removal of transportation is an independent predictor of worse occupational performance outcomes.

The Commission notes that Ms Thomas, in her report to the Appellant's legal counsel, dated November 22, 2006, states that:

An aide or a family member is required to accompany a person who has sustained a severe brain injury for all activities. The aide is an "accommodation" required by the severely brain injured in the same fashion that a wheelchair is required by a person with a spinal cord injury.

After considering the submissions of both legal counsel, the Commission notes that MPIC has not provided any rebuttal to the comments of Ms Thomas, Dr. Boyd and Dr. Eggertson in respect

of the value to the Appellant of his trips to [Text deleted]. As a result, the Commission accepts the reports of Ms Thomas, Dr. Boyd and Dr. Eggertson, and comments in respect of the importance of the Appellant's trips to [Text deleted] to visit his sister and family, and rejects the submission of MPIC in this respect.

The Commission finds that, on the balance of probabilities, pursuant to Section 138 of the MPIC Act it was necessary and advisable for the Appellant and his attendant to travel by airplane to visit the Appellant's sister and family. The Commission notes that the cancellation of this airplane trip was due to a doctor's recommendation for medical reasons in respect of the Appellant. The Commission therefore finds that MPIC is required to reimburse the Appellant, and/or the Appellant's attendant, for the cancellation fees incurred in respect of the airplane trip to [Text deleted].

Decision

Under Section 184(1) of the MPIC Act the Commission, after conducting a hearing, can make any decision that MPIC could have made. The Commission determines that it is necessary or advisable, pursuant to Section 138 of the MPIC Act, to reimburse expenses incurred by the Appellant, and/or the Appellant's attendants, and/or the Appellant's family members, in respect of the claims rejected by MPIC, which are set out on page 4 of this Decision (a to g inclusive). The Commission, for the reasons outlined herein, allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated April 18, 2007.

The Commission directs MPIC to:

- a. compensate the Appellant, Appellant's attendants and family members in respect of all of the expenses they incurred in respect of the claims which MPIC rejected and which are set out on page four (4) of this decision (a to g inclusive);

- b. reinstate the Appellant's entitlement for reimbursement of expenses relating to Personal Injury Protection Plan benefits pursuant to Section 138 of the Manitoba Public Insurance Corporation Act.

The Commission will retain jurisdiction in this matter and, if the parties are unable to agree on the amount of compensation within thirty (30) days of the date of this decision, then either party may, on reasonable notice, request the Commission to determine the amount of compensation.

Dated at Winnipeg this 11th day of September, 2008.

MEL MYERS, Q.C.

DIANE BERESFORD

SANDRA OAKLEY