



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-182

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms Barbara Miller
Dr. Patrick Doyle

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Dianne Pemkowski.

HEARING DATE: April 1, 2005

ISSUE(S): 1. Entitlement to coverage for physiotherapy treatments
beyond the frequency allowed (one treatment every three
weeks);
2. Entitlement to coverage for a gym membership.

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

[The Appellant] was involved in a motor vehicle accident on August 12, 1995. In an Inter-Departmental Memorandum, dated January 29, 2001, from the case manager to MPIC's Medical Services Team, the case manager stated:

This male, [text deleted]-years old at the time of the accident, was the belted operator of a motor vehicle proceeding through the intersection of [text deleted] and [text deleted] with the green light when his vehicle was broad-sided on the driver's side by another motorist, who failed to stop for the red light.

[The Appellant] was conveyed to [hospital] with loss of consciousness of approximately one hour, as a result of a closed head injury. He was admitted to ICU in critical condition where he spent four days.

[The Appellant] also sustained:

- fractured left pelvic,
- fractured ribs (7 through 12),
- pneumothorax,
- splenectomy,
- internal bleeding,
- hearing loss – left ear.

The Internal Review Officer, in his decision dated July 9, 2004, states:

. . . You sustained serious orthopedic injuries in your motor vehicle accident. These healed in such a way as to leave your ribcage and torso distorted. The kind of work you do aggravates the musculature in your torso.

The Appellant, subsequent to the motor vehicle accident, attended for both physiotherapy and chiropractic treatments to deal with his ongoing musculature problems. His physiotherapist, in a report to the case manager dated January 12, 2001, stated:

Physiotherapy treatment, of late, has focused predominantly on the thoracic area. Findings in this area include: rib cage asymmetry (at site of rib fractures) leading to altered thoracic spine mechanics and compensatory chronic muscular spasm/tightness. These problems are assisted with manual articular and soft tissue mobilization, as well as interferential current. An adjunctive exercise program would be beneficial and [the Appellant] has previously participated in same with good results.

At this time, I would recommend enrollment in a gym program. Concurrently, he should continue to attend Physiotherapy weekly for 4 weeks. At that point, he should attend once every other week, for a further 3 – 4 visits. Reassessment should then occur with recommendations for long term management.

In a memo to file dated January 18, 2002 the case manager indicated that he had a telephone discussion with the Appellant on January 14, 2002 and states:

Claimant had called as gym membership comes up for renewal in February. We confirmed he has reduced physio and chiro attendance the past year. He hopes to

continue for this year. I proposed covering 100% this year, 50% next year which should be supported by physio and or chiro reports as he admits additional benefits to going to gym on regular basis. Based on the nature of this file, I feel the above course of action is most appropriate.

The Appellant's treating physician, [text deleted], referred the Appellant to [Appellant's physiatrist] for his assessment in respect of the treatment the Appellant was receiving relating to his orthopedic injuries. [Appellant's physiatrist], in his report to [Appellant's doctor] dated March 15, 2002, stated:

There was prominence of the left mid-thoracic paraspinals in the prone position. Palpation of these tissues was reported as tender. There was also tenderness over the left infraspinatus, left trapezius and left cervical paraspinals.

The history provided indicates that [the Appellant] sustained significant injuries in the motor vehicle collision of August 1995. He has made a good recovery, but he continues to report musculoskeletal symptoms affecting the left upper quadrant and left pelvis/hip. I did not detect any abnormalities indicative of a neurologic injury. He is attending a physiotherapist once every two weeks and a chiropractor once every month to obtain some relief of the cervicothoracic discomfort. He finds the treatment especially helpful for relief of the thoracic paraspinal pain. He also attends a gym regularly and he finds that routine exercise allows him to maintain his function. He does not use any medications on a regular schedule, but Ibuprofen and Tylenol #3 are used on occasion.

I do not have any new therapeutic recommendations to suggest regarding his management. His treatment appears to have been appropriate and reasonable. I feel that maintaining his current maintenance treatment would be reasonable. At this time, a formal follow up appointment was not required. (underlining added)

On January 24, 2003 the case manager wrote to the Appellant and advised him that MPIC has rejected the Appellant's request for coverage for the cost of an annual gym membership. The case manager further informed the Appellant that ongoing exercising and conditioning can be achieved in the home setting and, as a result, a gym membership was not medically required in accordance with Section 136(1) of the MPIC Act and Section 5 of Manitoba Regulation 40/94.

The case manager further stated in his letter to the Appellant:

In the event you feel coverage should be extended to you for the cost of a gym

membership, please purchase same and submit the invoice along with medical substantiation of the requirement. We will then have the expense claim reviewed by a medical consultant from our Health Care Services Department and advise their opinion as to whether coverage should or shouldn't be afforded. In the latter instance, a decision letter would follow for which you would have the right to initiate the internal review process.

In reply, the Appellant wrote to the case manager on February 10, 2003 and stated:

Attached is the gym membership renewal and pertaining cost of \$606.48. This issue has not changed and you should find various medical professional support on this issue documented in my file. As per our conversation you arrogantly stated that a ball would be sufficient but you could not support it with any medical professional opinion or state it in a letter as I've requested. My continual problems with my back, neck, shoulder, hip and leg are areas that have been well documented in my file. Regurgitating the reasons I continue to have problems will only be costly with the same result. You appeared to be concerned with the associated cost. We spoke a year ago about Physiotherapy appointments reducing as a result of the membership. This has happened from once a week, to once ever (sic) two weeks. Recently I've been able to visit [text deleted] Physiotherapy once ever (sic) three weeks but do find it difficult if I don't maintain a regular exercise program. I would love to stop appointments altogether but I have to accept that my situation is permanent; I wish you would as well. (underlining added)

[Text deleted], the Appellant's physiotherapist, provided a Health Care Provider Progress Report to MPIC dated February 26, 2003. In this report [Appellant's physiotherapist] stated that the Appellant's symptoms were thoracic, cervical pain and "*[The Appellant] reports fairly good symptom control with intermittent treatment and regular exercise.*" In respect of objective signs, [Appellant's physiotherapist] stated:

Structural rib deformity – L prominent
 ++ overlaying tightness
 Hypomobility thoracic spine
 Tightness L > R UQ

In respect of her diagnosis, [Appellant's physiotherapist] stated in this report:

Chronic thoracic strain – mechanical contrib 2^o rib cage deformity

[Appellant's physiotherapist] further stated in this report that the Appellant attends physiotherapy treatments once every two to three weeks.

The case manager wrote to [text deleted], a consultant with MPIC's Health Care Services, on March 11, 2003, and provided [MPIC's doctor #1] with the Appellant's medical file and requested that he provide his medical opinions on the following issues:

- Would a gym membership assist in [the Appellant's] medical or rehabilitative goals? Is the need for the gym membership MVA related? [The Appellant] attends Physiotherapy once every 2-3 weeks and Chiropractic once a month.
- Your opinion on the physiotherapy treatment plan is also requested. Would a gym membership reduce the need for physiotherapy treatments?

In reply, [MPIC's doctor #1] in a report dated July 25, 2003 stated that:

1. in respect of physiotherapy treatments, such treatments would not assist in improving the Appellant's health since the purpose of such treatments was intended only for symptom modification.
2. in his opinion such treatments would be considered to be elective in nature and provided only for alteration of pain.
3. the gym membership cannot be considered to constitute a medical necessity.
4. since the Appellant's condition had reached maximum medical improvement, it was unclear to him ([MPIC's doctor #1]) what the effect would have been in withholding this therapy in respect of preventing further improvement to the Appellant's condition.
5. cardiovascular and resistive exercises can be performed in numerous settings using numerous different modalities and a gymnasium setting would be but one venue to achieve the goals of exercise.

6. for these reasons it was his opinion that the provision of a gym membership would be considered elective in nature.

On August 7, 2003 the case manager wrote to [the Appellant] and stated:

As we discussed in our telephone conversation of August 5, 2003, a review of your requirement for physiotherapy treatment and a gym membership in relation to the motor vehicle accident of August 11, 1995 (sic) has been completed.

Based on all the available information, our Health Care Services has opined (sic) the need for physiotherapy treatments is for symptom modification and elective in nature. Therefore, physiotherapy treatment funding and related travel cost reimbursement will end as of August 31, 2003. Subsequent to that date, Manitoba Public Insurance will be unable to fund any further physiotherapy treatments.

The gym membership cannot be considered to constitute a medical necessity and is elective in nature. Therefore, we cannot provide reimbursement of your gym membership costs.

On September 29, 2003 the Appellant made an Application for Review of the case manager's decision and stated:

My treatment for physiotherapy pertains to continued problems with my leg, shoulder, neck and back. These areas are not possible to be rehabilitated back to normal function. I have chronic severe muscle spasm along my spine from the simple use of my arms. My neck develops a tightness that appears to develop largely from simply looking downward. My shoulder and leg (hip) develop tightness from everyday activities. There is no remedy for these problems.

I presently am attending physiotherapy every two weeks for approximately 1.5 hours which consists largely of relaxation of the muscle along the spine and relief of tightness in the neck. This spasm does not accumulate as much when I maintain a regular fitness program and has since lessened my physiotherapy treatments from originally 3 times a week to once every two weeks. I attend [text deleted] Chiropractor which relieves the stress which builds up throughout my neck and back.

I would love to stop my physiotherapy treatments, the attendance at the gym but I can not afford to physically. MPIC has supplied a bed and an office chair which are instrumental in my daily functions but simple everyday activities cannot be maintained without regular treatment. In fact increased activity results in increased pain and spasm and decreased function. Without intermittent treatment my quality of life would diminish and I would have difficulty maintaining my usual work and recreational activities. (underlining added)

The Appellant's Physiotherapist, [text deleted], provided a letter dated November 14, 2003 in support of the Appellant's need to have regular physiotherapy treatments. [Appellant's physiotherapist] described the Appellant's orthopedic injuries as follows:

[The Appellant] continues to have findings of chest wall deformity (sic) from left rib fractures, resulting in hypomobility and soft tissue spasm in the mid/lower thoracic areas. Scapula is elevated and protracted on the chest wall with chronic tightening of the levator scapulae muscle. The altered scapula position also affects left shoulder mechanics. There is limitation of end ranges of movement, including quadrant, and limited strength. Of note, there is reproducible crepitus of unknown cause (? internal).

[Appellant's physiotherapist] further stated:

Despite being instructed in appropriate home exercises [the Appellant] has difficulty maintaining his current functional status with intermittent treatment. He complains of increased pain and tightness to the left mid T-spine and left upper quadrant, which results in difficulty maintaining erect postures and using his left upper extremity. He notes particular problems at his computer at work or maintaining neck flexion as in reading or studying. If untreated [the Appellant] reports headaches and is required to decrease activity and take medication.

Objectively, he will present with more muscle spasm and decreased ORM of his thorax, neck and shoulder. These findings are improved following treatment.

At present [the Appellant's] treatment are supportive in nature, allowing him to maintain his current level of function and quality of life. I have noted that when he consistently participates in a resisted exercise program his complaints and findings are not as severe. Of note, [the Appellant] continues to have intermittent low back and left thigh pain/dysfunction, but is able to self manage. (underlining added)

On February 19, 2004 [text deleted], the Appellant's physician, wrote to the Internal Review Officer and stated:

[The Appellant] is leading a productive, hard-working life. He feels that he needs to continue with the gym two days a week, physiotherapy once every two weeks, and chiropractic once a month. I feel this should be continued as rehabilitation expenses.

In further support of the Appellant's Application for Review [text deleted], the Appellant's Chiropractor, wrote to the Internal Review Officer and stated:

Due to the injuries suffered in the above mentioned accident, the patient does have some difficulties at work. He gets stiff and feels pain if he sits for too long and has a hard time working with his head down. The stretching and strengthening program that he maintains with his physiotherapist and gym program are able to keep him at a level where his work productivity is good. As soon as he deviates from his program his work productivity diminishes due to the flare-ups of pain and stiffness. (underlining added)

On April 27, 2004 the Internal Review Officer wrote to [Appellant's physiotherapist] and requested a supplementary report seeking clarification in respect of [Appellant's physiotherapist's] letter dated November 14, 2003. In response to the Internal Review Officer's letter, by letter dated May 13, 2004, [Appellant's physiotherapist] stated:

[The Appellant] continues to complain of left > right thoracic spine pain and stiffness, left upper trapezius pain, and left shoulder crepitus (not investigated) and weakness. He has an active lifestyle, including recreational sports.

[The Appellant] notes increased symptoms with increasing physical demands, sustained cervical and thoracic flexion and prolonged time reading or at the computer. His job duties necessitate working at different client's workstations, therefore consistent ergonomic set up is not possible. These aggravation factors result in increased pain, stiffness and difficulty maintaining an erect posture, despite stretching. He typically does not need medication. However, when the thoracic symptoms increase, he has increasing pain in the left shoulder and neck, occasionally with associated headaches, requiring medication.

1. To clarify, [the Appellant] has been on supportive care for an extended period of time, so there has not really been "courses" of physiotherapy. He also continues to attend the chiropractor for supportive care. The deterioration of status presents as limited thoracic extension and rotations, with hypertonicity of the thoracic paraspinal muscles, hypomobility of the facet joints, and increased tone to the upper trapezius and levator scapulae muscles. These signs and symptoms remain minimal with periodic treatment and regular gym attendance. His tolerance is approximately 2 - 4 weeks between treatments, depending on the aggravating factors present and attendance at the gym.
2. [The Appellant] underwent a course of stabilization exercises, and has a home stretching program and free weights.
 - (a) The gym program provides resisted exercise for many of the trunk supporting musculature - latissimus dorsi, erector spinae, rhomboids, gluteals etc. The use of universal gym equipment offers the ability to work with resistance much greater than could be duplicated with a home program.
 - (b) . . .
 - (c) [The Appellant] began a gym program to supplement his treatment, and facilitate a return to work in 1997/1998. He had increasing difficulty in maintaining his status over the next few years, and has found his symptoms to better controlled with a return to regular gym workouts. Historically, he has less subjective complaints and fewer objective findings with regular gym attendance. (underlining added)

Internal Review Officer's Decision

The Internal Review Officer conducted a hearing in respect of the Appellant's Application for Review on November 3, 2003 and subsequently received several reports from [text deleted], MPIC's Chiropractic Consultant, [text deleted] the Appellant's Chiropractor, and [text deleted], the Appellant's Physiotherapist. On July 9, 2004 the Internal Review Officer issued his decision, modifying the case manager's decision and stated:

This Review has amended the August 7, 2003 decision. You are entitled to coverage for a physiotherapy treatment every three weeks. Your case manager will calculate and pay to you the amount owing to date with the prescribed interest.

The August 7, 2003 decision declined to extend coverage to you for a gym membership and this Review has confirmed that part of the decision, although for somewhat different reasons. You are, however, entitled to coverage for a maximum of three sessions with a physiotherapist or athletic therapist of your choice to set up an appropriate home exercise program. (underlining added)

The Internal Review Officer in rejecting the case manager's decision to deny physiotherapy treatments to the Appellant, refers to Section 10(1)(e) of Manitoba Regulation 40/94 and states:

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's doctor #2], nor [MPIC's doctor #1], 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 the intermittent physiotherapy that [Appellant's physiotherapist] recommends. She says your "tolerance is approximately 2-4 weeks between treatments." I think it would be reasonable to extend coverage to you for one physiotherapy treatment every three weeks. To avoid any possible misunderstanding, I should make it clear that I am not suggesting that the treatments have to be exactly three weeks apart. You are entitled to coverage for physiotherapy treatments, as needed, so long as they average out to about one every three weeks.

You also want funding for a gym membership and that is an entirely different matter. Such coverage cannot possibly be extended under Section 136 of the Act and Section 5 of the Regulation whether or not such a program is medically required" because such a program is not medical or paramedical care. That leaves the possibility that this can be regarded as a "rehabilitation expense." The problem is that there is little convincing

evidence that such a program is either "necessary or advisable" within the meaning of Section 10 of Regulation 40/94.

In respect of [Appellant's physiotherapist's] opinion that the Appellant would benefit from a gym program, the Internal Review Officer states that [Appellant's physiotherapist] did not provide objective evidence that there was an occupational or vocational need that an exercise program could not be satisfied by a home exercise program rather than a gym membership.

The Appellant filed a Notice of Appeal dated September 30, 2004 wherein he asserted that he had to continue with his regular regime in order to maintain his physical abilities in respect of his personal and employment life. He further asserted that the continued problems with his back, neck, shoulder, chest, arm and leg, if left unattended, depleted his ability to meet his every day obligations, including employment. He also stated that his regular routine had been recommended and supported by three independent practitioners, his physiotherapist, chiropractor and general practitioner.

Appeal

The relevant provisions of the MPIC Act and Regulations are as follows:

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.

The appeal hearing took place on April 1, 2005. The Appellant appeared on his own behalf and Ms Pemkowski appeared on behalf of MPIC.

The Appellant testified that:

1. his employment as [text deleted] required him to carry out his activities in a sedentary fashion sitting at a desk using a computer to [text deleted].
2. in order to continue to be fully productive in his employment on a full time basis it is essential that he be entitled to receive physiotherapy at least once every two weeks rather than every three weeks.
3. attendance at a gym was essential to maintain his physical health because the gym provided the appropriate exercise equipment which assisted him in reducing the continuous problems he had to his back, neck, shoulders and arms.
4. by regular physiotherapy treatments once every two weeks, and attending a gymnasium on a regular basis, he was able to reduce the pain to his neck, back, shoulders and arms.
5. as a result, he was able to function productively, on a full time basis, at work and to maintain his quality of life outside of the workplace.

In support of his position he referred to the reports of [Appellant's physiatrist], [Appellant's doctor], [Appellant's chiropractor] and [Appellant's physiotherapist].

In respect of physiotherapy treatments, MPIC's legal counsel submitted that:

- 1, the Internal Review Officer had accepted the opinions of [Appellant's physiotherapist] in providing physiotherapy treatments and rejected the medical opinion of [MPIC's doctor #1], that such physiotherapy treatments were not medically required.
2. the only issue in dispute in respect of physiotherapy treatments was whether they be provided once every three weeks or once every two weeks.
3. the Internal Review Officer concluded that in accordance with Section 10(1)(e) of Manitoba Regulation 40/94, one physiotherapy treatment every three weeks was reasonable.

MPIC's legal counsel submitted that:

1. the Internal Review Officer in respect of refusing to reimburse the Appellant for the cost of a gym membership was correct in relying on the medical opinion of [MPIC's doctor #1] and in rejecting the opinion of [Appellant's physiotherapist].
2. there was no available objective evidence to establish that an occupational/vocational need for any exercise program could not be satisfied just as well by a properly designed home exercise program as by a gym membership.
3. it was appropriate for the Internal Review Officer to direct that MPIC fund an additional three physiotherapy sessions in order to permit the Appellant to obtain assistance in the design of an appropriate home exercise program.

Discussion

Physiotherapy Treatment

In respect of physiotherapy treatments, the Appellant testified in a clear and unequivocal fashion 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.

The Commission finds that the Appellant was a credible witness, and was impressed with the manner in which he testified, both in examination-in-chief and in cross-examination, and accepts his testimony in respect of this matter.

The Internal Review Officer accepted [Appellant's physiotherapist's] opinion 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. The Internal Review Officer further stated "*I think it would be reasonable to extend coverage to you for one physiotherapy treatment every three weeks.*"

The Commission agrees with the Internal Review Officer that [Appellant's physiotherapist] made a persuasive argument to support physiotherapy treatments for the Appellant and to reject [MPIC's doctor #1's] medical opinion in this respect. However, the 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 [Appellant's physiatrist], nor the opinions of [Appellant's doctor] or [Appellant's chiropractor]. [Appellant's physiotherapist's] opinion in respect of the frequency of physiotherapy treatments is supported by the medical opinion of [Appellant's physiatrist], who personally examined the Appellant. In his report to the [Appellant's doctor], dated March 15, 2002, [Appellant's physiatrist] states that the Appellant attends a physiotherapy treatment once every two weeks, a chiropractor once every month in order to obtain some relief for his cervicothoracic discomfort. [Appellant's physiatrist] further states that the Appellant "*. . . finds the treatment especially helpful for relief of the thoracic paraspinal pain.*" [Appellant's physiatrist] further states that the Appellant's treatment in this respect was both "*...appropriate and reasonable. I feel that maintaining his current maintenance treatment would be reasonable.*" [Appellant's physiatrist's] opinion in this respect is supported by the position of [Appellant's doctor] in his report to the Internal Review Officer dated February 19, 2004 and by the Appellant's chiropractor in a report to the Internal Review Officer dated February 26, 2004.

The Commission finds that the Appellant's testimony that it was essential for his personal and vocational needs to have a physiotherapy treatment every two weeks is corroborated not only by [Appellant's physiotherapist], but also by the medical opinions of [Appellant's physiatrist] and [Appellant's doctor], and as well by the opinion of [Appellant's chiropractor]. For these reasons, the Commission finds that the Appellant has established, on a balance of probabilities, that it was necessary or advisable for the rehabilitation of the Appellant that MPIC fund the Appellant's physiotherapy treatments every two weeks pursuant to Section 10(1)(e) of the MPIC Act.

Gym Membership

In respect of the obligation of MPIC to provide the cost of a membership to a gym, the Appellant has testified that:

1. the combination of physiotherapy treatments every two weeks and regular attendance at a gym provides him with the necessary relief in order to maintain his productivity at work and generally his quality of life.
2. when he is able to attend a gym on a regular basis he is able to better maintain his productivity and his quality of life.
3. when he is unable to attend a gym on a regular basis there is an increase in the pain, muscle spasms and tightness to his neck, back, shoulders and arms.
4. the combination of physiotherapy treatments every two weeks and regular attendance at a gym provides him with greater pain relief to his arm, neck, back and shoulders than when he receives physiotherapy treatments once every three weeks and does home exercises only.

The Commission finds that the Appellant testified in a clear and convincing fashion with respect to the need to attend a gymnasium on a regular basis in order to participate in exercises on exercise machines that are not available to him when conducting home exercises. The Commission determines that the Appellant was a credible witness in respect of this issue.

The Internal Review Officer in rejecting the Appellant's request for reimbursement of the cost of a gym membership concluded that the physiotherapist had not provided detailed objective evidence to support the need for such a program and had relied instead on references to the Appellant's subjective complaints. The Commission notes that the physiotherapist, in support of the Appellant's position, suggested that a gym program was advisable because it offered the

Appellant the ability to work with resistance much greater than can be duplicated with a home program. The Internal Review Officer, in rejecting the physiotherapist's opinion in this respect, indicated that it was not clear to him why strengthening exercises, i.e. work against significant resistance, are required to keep the Appellant loose enough to continue working at a computer terminal. As a result, the Internal Review Officer rejected the Appellant's request for coverage in respect of a gym membership.

The Commission finds that in rejecting the physiotherapist's opinion in this respect the Internal Review Officer failed to consider the medical opinion of [Appellant's physiatrist] who in his report to [Appellant's doctor], dated March 15, 2002, stated in respect of the Appellant's attendance at a gym "*He also attends a gym regularly and he finds the routine exercise allows him to maintain his function.*" In respect of the Appellant's treatment, which included attendance at a gym on a regular basis, [Appellant's physiatrist] stated "*His treatment appears to have been appropriate and reasonable. I feel that maintaining his current maintenance treatment would be reasonable.*"

The Commission finds that:

1. [Appellant's physiatrist] personally examined the Appellant on March 11, 2002 and accepted that the Appellant's attendance at a gym on a regular basis, was part of an appropriate and reasonable maintenance treatment program.
2. this maintenance treatment program is totally consistent with the opinion of [Appellant's physiotherapist].
3. unlike [MPIC's doctor #1], who conducted a paper review only, the Appellant was examined by both [Appellant's physiatrist] and [Appellant's physiotherapist], who both concluded that attendance at a gym was a reasonable and appropriate

- maintenance treatment.
4. the Internal Review Officer, before rejecting the Appellant's request for reimbursement of the cost of a gym membership, did not seek clarification from [Appellant's physiotherapist] nor arrange for [Appellant's physiatrist] to reassess the Appellant.

The Commission concludes that the Appellant's testimony in respect of his need to attend a gym on a regular basis is corroborated by the opinions of [Appellant's physiotherapist] and [Appellant's physiatrist] in this respect. In these circumstances the Commission gives greater weight to their opinions than it does to [MPIC's doctor #1], who never personally examined the Appellant.

It is for these reasons the Commission finds that the Appellant has established, on the balance of probabilities, that pursuant to Section 10(1)(e) of Manitoba Regulation 40/94 it is necessary and advisable for the rehabilitation of the Appellant for MPIC to reimburse him for the cost of a gym membership.

Decision

The Commission therefore grants the Appellant's appeal and directs:

1. that MPIC fund the Appellant's physiotherapy treatments on the basis of two times during every three week period, from the date of termination on August 31, 2003, together with interest;
2. to reimburse the Appellant for the cost of a gym membership.

The decision of MPIC's Internal Review Officer dated July 9, 2004 is therefore rescinded and

the foregoing substituted for it.

Dated at Winnipeg this 19th day of May, 2005.

MEL MYERS, Q.C.

BARBARA MILLER

DR. PATRICK DOYLE