

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-125**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Ms Lorna Turnbull

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski and Ms Danielle Robinson.

HEARING DATE: April 28 and 29, 2009

ISSUE(S): Whether Appellant's Personal Injury Protection Plan benefits were properly suspended effective 30 Jan 04 pursuant to Sections 142 and 160(b) and (g) of The MPIC Act.

Entitlement to reimbursement for the following expenses:

- Airfare from [text deleted] - \$368.08
- Rerouting of mail - \$28.89
- [Text deleted] (photocopying) - \$8.78
- Queen's Printer (Purchase of MPI Regulations) - \$45.42
- Canada Post (XPress Post) - \$5.34
- [Text deleted] (photocopying) - \$11.52
- Redoxon & Daily One Vitamins - \$20.30
- [Text deleted] (photocopying) - \$8.90
- Canada Post (XPress Post) - \$5.34
- [Text deleted] (2 books & the Comp. water workout) - \$46.38
- [Text deleted] (Obus Form, gel & book) - \$121.73
- [Text deleted] (photocopying) - \$6.04
- [Text deleted] ("equipment") - \$69.59

Travel expenses:

- For the period 01 Nov 01 to 19 Apr 02 – 6 kms denied of the 312 kms submitted
- For the period 20 Apr 02 to 11 May 02 – 57 kms denied of the 433 kms submitted

- For the period 13 May 02 to 23 May 02 – 17 kms denied of the 432 kms submitted and \$1.00 for parking denied of the \$2.00 submitted

Entitlement to reimbursement for the following expenses:

- Psychotherapy sessions with [Appellant's psychotherapist] covering the period 18 Feb 04 to 21 Jul 04 (both inclusive)
- Report from [Appellant's psychotherapist] to the Manitoba Human Rights Commission - \$250.00
- E-mail from [Appellant's psychotherapist] to Appellant's lawyer on 16 Apr 04 - \$112.50
- Report from [Appellant's psychotherapist] dated 12 May 04 at a cost of \$1,125.00 less the \$250.00 allowed.

**** Whether Appellant's Personal Injury Protection Plan benefits were properly suspended pursuant to Sections 160(b) and (d) of The MPIC Act.**

Note: ** Fresh decisions rendered by the Case Manager dated 17 Oct 05 and 04 Nov 05 renders the Internal Review Decision of 29 Aug 05 moot.

RELEVANT SECTIONS: Sections 136(1)(a), 160(b) and 150 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Sections 5, 19 and 24 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

Background

Whether the Appellant's Personal Injury Protection Plan Benefits were Properly Suspended effective January 30, 2004 pursuant to Section 142 and 160(b) of the MPIC Act:

On October 27, 1998, the Appellant was involved in a motor vehicle accident. Injuries sustained from that accident have prevented her from returning to her work as a [text deleted]. These

injuries included pain and weakness in the cervical and shoulder regions, as well as numbness and tingling in her right hand. The Appellant also experienced some psychological difficulties.

The Appellant was in receipt of Income Replacement Indemnity (“IRI”) benefits from MPIC as well as other Personal Insurance Protection Plan (“PIPP”) benefits, including treatment expenses.

However, relations between the Appellant and MPIC became strained. An external case manager, [Appellant’s external case manager], a Vocational Rehabilitation Consultant employed by [rehab consulting company], was contracted to be an intermediary.

In November of 2000, the Appellant had withdrawn her authorizations for MPIC to obtain reports or talk to her caregiver practitioners. A meeting was held on November 16, 2000 with the Appellant, MPIC’s representative and [Appellant’s external case manager], to attempt to settle the central issues of access to medical information and concern over MPIC’s involvement in her care. As a result of this meeting, it was decided that an authorization form signed by the Appellant in favour of [rehab consulting company] would suffice, and that MPIC would request information through [Appellant’s external case manager]. The Appellant would be informed and cooperate in the flow of that relevant information.

On May 31, 2002, the Appellant’s case manager denied some reimbursement claims of the Appellant. The Appellant failed to file a timely Application for Internal Review in the matter, MPIC would not extend the time for filing the Application. This decision was appealed to the Commission which found, in a decision dated December 8, 2004 that the Appellant had filed a timely application in the circumstances or, in the alternative, had a reasonable medical excuse for failing to file a timely application for review. The Commission also noted that MPIC did not

have the jurisdiction to predetermine future claims for care and treatment of expenses of the Appellant and to the extent that the case manager's letter of May 31, 2002 purported to determine that, the determination was invalid and of no effect. (See [text deleted] *AC-03-109*)

On October 30, 2003, MPIC informed the Appellant that the two year determination process for determining what occupation the Appellant could perform would begin and asked for a medical authorization to obtain updated medical information as deemed necessary, directly from her care providers. The Appellant did not comply, and due to conflicts with [Appellant's external case manager], that contract was suspended.

Based upon concerns regarding the lack of privacy protection in the MPIC authorization forms, the Appellant refused to sign the forms and on January 14, 2004, her benefits were terminated, effective January 30, 2004 if a medical authorization form was not completed by that date. The Appellant sought an Internal Review of this decision and an Internal Review Decision dated May 11, 2004 upheld the suspension of the Appellant's benefits.

This is one of the decisions from which the Appellant has now appealed.

Eventually, MPIC made changes to the forms it was using to authorize the gathering of medical information. On February 18, 2005, the Appellant was sent updated medical authorization forms which were signed by her, with some amendments, and returned to MPIC in May of 2005.

However, the Appellant's PIPP benefits were not paid, due to the suspension, between January 30, 2004 and May 2, 2005.

In her appeal, the Appellant asserts that her benefits were improperly suspended when she refused to sign original authorization forms which did not comply with privacy legislation, and that MPIC failed in its duty under Section 150 of the MPIC Act to advise and assist claimants and endeavour to ensure that they are informed of and receive the compensation to which they are entitled. She also took the position that MPIC's actions in this regard constituted bad faith, malfeasance in public office and a breach of its duty to act in good faith.

Entitlement to Reimbursement for Miscellaneous Travel, Administrative and Equipment Expenses:

The Appellant has also appealed an Internal Review Decision, dated February 3, 2005 which arose out of the denial by her case manager, in a decision letter dated May 31, 2002, regarding her entitlement to reimbursement for a variety of expenses for items such as travel, parking, copying and mailing.

Entitlement to Reimbursement for Psychotherapy Sessions, and Reports and Letters from [Appellant's psychotherapist]:

The Appellant has also filed an appeal in regard to an Internal Review Decision dated May 5, 2005. That Review decision upheld denial by the Appellant's case manager of reimbursement for sessions with her psychotherapist, [text deleted], between February 18, 2004 and July 21, 2004, as well as the cost of a report from [Appellant's psychotherapist] to the Manitoba Human Rights Commission, an email from [Appellant's psychotherapist] to the Appellant's lawyer and a report from [Appellant's psychotherapist] which cost more than the \$250.00 reimbursement allowed for such reports.

Whether the Appellant's PIPP benefits were properly suspended pursuant to Section 160(b) and (d) of the MPIC Act:

The Appellant filed an appeal in regard to an Internal Review Decision of August 29, 2005. That Review concerned a case manager's decision letter dated July 13, 2005 suspending the Appellant's entitlement to PIPP benefits, pursuant to Section 160(b) and (d) of the Act for failure to cooperate in the rehabilitation process, based upon her conduct when attending an appointment with [independent doctor], who had been asked to undertake an independent psychiatric examination of the Appellant.

This appeal has since become moot, as MPIC issued decisions on October 17, 2005 and November 3, 2005 reinstating the Appellant's PIPP benefits effective May 2, 2005, as a result of third party and attending psychologist's recommendations.

Pre-Hearing Matters:

During the course of preparing these appeals for hearing, the parties identified two jurisdictional issues. A prehearing meeting was scheduled by the Commission to deal with the issues of:

- a) whether or not the Commission has jurisdiction to deal with the Appellant's claim of misconduct contrary to Section 150 of the MPIC Act, and
- b) whether or not the Commission has jurisdiction to award legal costs or any other remedy for violations of Section 150 of the MPIC Act.

These issues were heard and a decision issued by the Commission on February 27, 2008. The panel found that it had jurisdiction to deal with the claim of misconduct contrary to Section 150 of the MPIC Act. The Corporation's actions while making decisions to deny the Appellant benefits and compensation may be relevant to the review and assessment of the determination of her entitlement and the decisions of the Internal Review Officers in that regard.

The panel found however that the Commission does not have jurisdiction to award legal costs for a violation of Section 150 of the MPIC Act. (see [text deleted] *AC-04-125*)

Accordingly, the issues left to be resolved are whether it was reasonable for MPIC to suspend the Appellant's PIPP benefits between January 30, 2004 and May 2, 2005, due to her refusal to sign medical authorization forms on account of her concerns regarding privacy protections. As well, the Appellant's allegations that MPIC has failed to treat her in good faith, remain an issue, as does her entitlement to reimbursement for the various expenses noted.

A hearing into the Appellant's appeals was held on April 28 and 29, 2009. The panel heard evidence and submissions. Counsel for MPIC provided a further written submission on May 21, 2009. Counsel for the Appellant provided a further written reply on June 10, 2009.

Evidence and Submission for the Appellant

The Appellant testified, at length, at the hearing into her appeal. She described in detail her dealings with MPIC, her concerns regarding the lack of privacy protection in MPIC's forms, and her efforts to receive diagnosis and treatment without, according to the Appellant, much help from MPIC. She also described the medical issues she had faced and the treatment she had received.

The Appellant felt that MPIC did not assist her in her recovery or in the management of her claim. The panel heard evidence from the Appellant that she was clearly given the message that she was considered by MPIC to be a difficult client and that the issues and problems in the management of her claim were all her fault because she was such a "difficult" claimant.

The Appellant's testimony included an extensive review of the forms and reports on file. Medical reports from caregivers were reviewed, along with psychological reports from [Appellant's psychotherapist], her caregiver, [independent psychiatrist], an independent psychiatrist, and [MPIC's psychologist], MPIC's psychological health care consultant.

The Appellant was not cross-examined by MPIC.

Counsel for the Appellant reviewed overriding privacy concerns and privacy legislation in the Province of Manitoba, including the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and *The Personal Health Information Act* ("PHIA"). He reviewed the history of the relationship between the Appellant and MPIC and the attempts at forming a workable relationship with [Appellant's external case manager]. He reviewed the medical reports as well.

Counsel for the Appellant submitted that MPIC's suspension of the Appellant was improper and that her refusal to sign the medical authorization release forms was justified based upon privacy rights and legislation. He submitted that MPIC had not acted in good faith towards the Appellant and that she should be entitled to reimbursement for the expenses requested in her appeals.

Evidence and Submission for MPIC

As noted, MPIC did not cross-examine the Appellant in regard to her testimony at the hearing.

Nor did MPIC call any oral evidence in support of its position.

In regard to the outstanding expenses claimed by the Appellant, Counsel for MPIC reviewed the MPIC Act and Regulations and submitted that there was no coverage for these items.

She noted that the travel expenses claimed were not for the purpose of receiving medical care, which is required by Section 19 and 25 of Manitoba Regulation 40/94. She also submitted that there was no PIPP coverage for expenses claimed such as rerouting mail, photocopying, purchasing MPIC Regulations and Xpresspost expenses.

Reimbursement for Redoxon, Vitamin C and daily vitamins had not been shown, by the evidence, to be medically required, and thus, pursuant to Section 136 of the MPIC Act and Section 5 of Regulation 40/94, were not eligible for reimbursement.

Counsel also submitted that reports from [Appellant's psychotherapist] to the Human Rights Commission and an email from the doctor to the Appellant's lawyer were not items for which reimbursement was available under the Act or Regulations.

Reimbursement for treatment expenses with [Appellant's psychotherapist] between the period of February 18, 2004 and July 21, 2004, would only be available to the Appellant if the Commission set aside the suspension of her PIPP benefits for the period from January 30, 2004 to May 2005.

In reviewing the Appellant's suspension under Section 142 and 160 of the MPIC Act, Counsel for MPIC submitted that there had never been an agreement, upon which the Appellant could

rely indefinitely, to say that as long as she was providing information through [Appellant's external case manager], she did not have to complete MPIC's forms.

Counsel for MPIC submitted that she could not say why MPIC had changed their forms and that nobody told MPIC that the original forms were not PHIA compliant. In fact, Counsel for MPIC submitted that the Appellant was not provided an opportunity to sign the new forms when they were changed, because the case manager had believed that it was concerns about her own privacy, and not about privacy law, which were preventing the Appellant from signing the original forms. MPIC had not acted maliciously in failing to send out the new forms to her, although it may have been an oversight, she submitted.

Counsel for MPIC took the position that the Appellant's privacy concerns were irrelevant in any case, since the subsection under which the Appellant was suspended, Section 160(b) of the MPIC Act, did not contain the phrase "without valid reason" (unlike many other subsections of Section 160). She submitted that because the phrase "without valid reason" had been specifically omitted from Section 160(b), neither MPIC nor the Commission had the authority to read those words into the subsection. To do so would constitute an error of law. Therefore, the Appellant's reasons for refusing to sign the forms could not be taken into account.

The Commission requested Counsel for MPIC to comment upon the recent decision of the Commission in [text deleted] (*AC-05-96*), where the panel had held that if the Appellant provided a valid reason for the conduct complained of under Section 160(a) or (b) of the MPIC Act, this is one of the circumstances which the Commission might take into consideration in its deliberations regarding the Appellant's entitlement to benefits.

In the written submission received by the Commission from Counsel for MPIC, Counsel submitted that the [text deleted] decision had been based upon a finding that the Appellant had been unable to comply with the request for information and that there had been no actual refusal. Although the Commission may be vested with a discretion under Section 184(1) of the Act, neither MPIC nor the Commission has the statutory authority to consider whether there was a “valid reason” for the Appellant’s refusal to sign the authorizations. She further submitted that the refusals impaired the ability of MPIC to properly adjudicate the Appellant’s claims.

Discussion

Suspension of Benefits and Privacy Considerations:

The Appellant has submitted that her Personal Injury Protection Plan (“PIPP”) benefits were improperly suspended pursuant to Section 142 and Section 160(b) of the MPIC Act.

Corporation to be provided with information

[142](#) A claimant or a person who receives compensation under this Part shall provide any information, and any authorization necessary to obtain information, requested by the corporation for the purpose of this Part.

Corporation may refuse or terminate compensation

[160](#) The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;

The Appellant's PIPP benefits were suspended for failure to produce information and authorizations requested by the corporation. The Appellant took the position that the form of medical authorizations requested by the corporation did not comply with privacy protections found in the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and *Personal Health Information Protection Act* ("PHIA").

Counsel for the Appellant submitted that privacy is a fundamental human right enjoyed by every individual. That right, he argued, was infringed when the Appellant was denied benefits for not agreeing to sign a document which would have violated her right to privacy. The issue for the Commission was whether or not the Appellant's suspension of benefits was appropriate due to the fact that she refused to sign a "Medical Information Authorization" which was not compliant with the governing privacy legislation in the Province.

Counsel submitted that FIPPA was enacted to provide individuals with access to records held by the Manitoba Government and Crown Agencies, subject to certain exemptions. PHIA was designed to protect Manitobans' personal health information from inappropriate collection, use and disclosures by "trustees" (which include health professionals, health care facilities, public bodies or health services agencies) who collect or maintain personal health information.

He reviewed the underlying principles for the protection of privacy and personal information such as:

- collection limitation;
- purpose specification;
- security safeguards;

- individual participation; and
- accountability principles.

Such principles can be found in the Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data developed by the Organization for Economic Cooperation and Development, referred to by Counsel for the Appellant. According to these principles, it was submitted, the purpose for which information is collected should be disclosed at the time of collection or before use, the collection of personal information should be limited to what is necessary and an individual should be aware of and consent to the use of their personal information.

Counsel submitted that the MPIC Act must be interpreted in accordance with the fundamental purposes of privacy statutes, which prevail over the MPIC Act.

Section 5(2) of FIPPA provides:

Conflict with another Act

[5\(2\)](#) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other enactment expressly provides that the other enactment applies despite this Act.

Section 4(2) of PHIA provides

Conflict with another Act

[4\(2\)](#) If a provision of Part 3 of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other enactment more completely protects the confidentiality of personal health information.

The Commission agrees that Section 142 and Section 160 of the MPIC Act should be interpreted in light of the privacy provisions contained in FIPPA and, particularly, within PHIA.

Protections for the collection and use of personal information, are found in Sections 13(1), 13(2), and 14(2)(a) of PHIA.

Restrictions on collection

[13\(1\)](#) A trustee shall not collect personal health information about an individual unless

- (a) the information is collected for a lawful purpose connected with a function or activity of the trustee; and
- (b) the collection of the information is necessary for that purpose.

Limit on amount of information collected

[13\(2\)](#) A trustee shall collect only as much personal health information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.

Source of information

[14\(1\)](#) Whenever possible, a trustee shall collect personal health information directly from the individual the information is about.

Exceptions

[14\(2\)](#) Subsection (1) does not apply if

- (a) the individual has authorized another method of collection;
- (b) collection of the information directly from the individual could reasonably be expected to endanger the health or safety of the individual or another person;
- (c) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual;

(d) collection of the information directly from the individual could reasonably be expected to result in inaccurate information being collected; or

(e) another method of collection is authorized or required by a court order or an enactment of Manitoba or Canada.

Section 16 provides that before using or disclosing personal health information, a trustee shall take reasonable steps to ensure the information is accurate, up-to-date, complete and not misleading.

Duty to ensure accuracy of information

[16](#) Before using or disclosing personal health information, a trustee shall take reasonable steps to ensure that the information is accurate, up to date, complete and not misleading.

Section 20 provides protection regarding the use and disclosure of personal health information.

General duty of trustees re use and disclosure

[20\(1\)](#) A trustee shall not use or disclose personal health information except as authorized under this Division.

Limit on amount of information used or disclosed

[20\(2\)](#) Every use and disclosure by a trustee of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.

Based upon these provisions, and her understanding of privacy protections, the Appellant had a number of objections to the original forms which MPIC requested her to sign. These included:

- The forms provided a blanket authorization directed at any recipient of the signed document instead of providing directed authorizations for a named or specified third party to disclose personal health information to MPIC.
- The original form provided authorization for *any* “physician, hospital, clinic, health care facility, agency or person having medical information or files” concerning the Appellant to disclose *any* medical information to MPIC concerning her claim for compensation under the MPIC Act and Regulations. It did not provide authorization for a specified person or entity to provide specific medical information for a particular window of time which would be relevant to the accident or set out the date of the automobile accident, thereby narrowing the scope of information to that relating to the specific automobile accident and claim in question.
- The use of the term “any” medical information could potentially date back decades and not relate to the particular accident in question.
- The original form did not identify the purposes for disclosure to MPIC.
- The form provided that the authorization would be valid for a period of two years from the date of signature, without providing any opportunity for it to be revoked by the Appellant should circumstances change.

The Appellant expressed her concerns regarding the forms to MPIC, refusing to sign them because they were deficient, out-of-date and non-compliant with privacy protections.

She also maintained that another methodology for disclosure of personal care information had been agreed to between MPIC and the Appellant. The Commission heard evidence regarding the

agreements and methods which had previously been in place to allow MPIC to obtain the information it needed while accommodating the Appellant's concerns.

The Commission also heard evidence that sometime in approximately July of 2004, MPIC revised its medical authorization release forms. However, the evidence established that these new forms were not provided to the Appellant by mail until February 18, 2005.

The Appellant reviewed the new forms, with the assistance of a lawyer with expertise in privacy law. While concerns still existed regarding the new form, she considered it superior to the old form in that it:

- provided for directed authorizations for named or specified third parties to disclose personal health information to MPIC.
- provided authorization for that specified person or entity to provide MPIC with personal health information regarding the injuries of the Appellant sustained from this accident, from the date of the accident and including up to two years of prior medical history as that history related to her injuries.
- stated that the information disclosed to MPIC was for the purpose of determining the Appellant's entitlement to benefits.
- provided that the authorization was valid for a period of two years from the date of signature unless earlier revoked by the Appellant in writing.

The Appellant requested some revisions to these new forms. MPIC considered these revisions and sent revised forms to the Appellant on April 18, 2005. These were signed by the Appellant on May 2, 2005 and returned to MPIC on May 6, 2005.

The Commission finds that the privacy legislation cited by the Appellant prevails, unless the statute in question (the MPIC Act) expressly provides that it prevails, or more completely protects the confidentiality of personal health information. We find that the MPIC Act does neither, and that Section 142 and Section 160 of the MPIC Act must be interpreted in light of the provisions of the privacy legislation.

We find that MPIC's suspension of the Appellant's benefits for her refusal to sign the original authorization forms was invalid, due to the failure of those forms to comply with privacy legislation. MPIC's request for the Appellant to sign the original authorizations did not comply with privacy legislation. Accordingly, MPIC cannot now rely on Section 160 of the MPIC Act to suspend or terminate the Appellant's benefits, when it has not proceeded to obtain information in a manner which conforms to its obligation to protect the privacy of claimants in accordance with the privacy legislation.

Counsel for MPIC, in her submission, focused on a plain language reading of Section 160(b) of the MPIC Act. She submitted that the absence of the phrase "without valid reason" in that subsection precludes the Commission from applying privacy considerations to the Appellant's refusal to sign the authorization forms.

In this regard, she reviewed other subsections of Section 160 which contain the phrase "without valid reason", contrasting these with subsections Section 160(a), (b) and (h), which do not.

Corporation may refuse or terminate compensation

[160](#) The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

(b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;

(c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;

(d) without valid reason, neglects or refuses to undergo a medical examination, or interferes with a medical examination, requested by the corporation;

(e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;

(f) without valid reason, prevents or delays recovery by his or her activities;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

(h) prevents or obstructs the corporation from exercising its right of subrogation under this Act.

She submitted that based upon rules of statutory interpretation, including the principles of “presumption of consistent expression” and of “implied exclusion”, the phrase “without valid reason” had been specifically omitted from Section 160(a) and (b) and neither MPIC nor the Commission has the authority to read those words into either subsection.

In this regard, Counsel was asked to comment upon the decision of the Commission in [text deleted], *AC-05-96*.

In the [text deleted] decision, another panel of the Commission considered MPIC’s argument that in the absence of the phrase “without valid reason” in a subsection of Section of 160, the Commission could not consider the reasons for the Appellant’s behavior. Any conduct falling within Section 160(a) or (b) of the MPIC Act would trigger strict consequences without any consideration of the Appellant’s reasons and the Appellant automatically must have his or her entitlement affected.

The Commission found, however, that it is well within the Commission's authority to take into account an Appellant's reasons or explanations, before the Commission comes to a final decision as to whether a refusal, reduction, suspension or cancellation of benefits under Section 160 should be upheld.

“Section 160 (a) through (h) establishes a series of circumstances under which a claimant's entitlement may be affected. If any of those circumstances apply, the claimant's entitlement may be refused, reduced, suspended or terminated.

Pursuant to principles of statutory interpretation, it is commonly recognized that when a legislated power is preceded by the term “may” a decision-maker has been given a discretionary decision-making power. This is in direct contrast to a legislated power that is preceded by the term “shall” or “must”, where the decision-maker is compelled to apply a certain result, without discretion...

If the Commission finds that either of the factual circumstances under Section 160(a) or (b) has been met, then it may go on to consider whether, on the whole, the Commission is satisfied that the overall circumstances warrant a refusal, reduction, suspension or termination of benefits. If the Commission finds that the Appellant has provided a valid reason for the conduct complained of, this is one of the circumstances which the Commission may take into consideration in its deliberations regarding the Appellant's entitlement to benefits.”

Counsel for MPIC submitted that the [text deleted] decision is only defensible if it is limited to its specific facts. She submitted that in that case, the Appellant had not been able to comply with the request for information and it could not be said that he actually “refused” to do so. She maintained that in the Appellant's case, neither MPIC, nor the Commission, has the authority to consider whether there was a “valid reason” for the Appellant's refusal to sign the authorizations, but could only consider the circumstances that led to the suspension of benefits and determine whether MPIC ought to have exercised its discretion in the manner that it did.

Counsel for MPIC emphasized the critical nature of authorizations to the proper administration of PIPP. She reviewed the Commission's decision in [text deleted], [2004] MAICACD No. 50 where the Commission found that the Appellant had unreasonably refused to sign authorizations and tried to impose unreasonable conditions upon them. The Commission found that the case manager had acted in a careful and prudent manner in attempting to obtain valid and current authorizations from the Appellant.

She submitted that the course of action of the Appellant in this case was as unacceptable as the actions of the Appellant in [text deleted].

We note that MPIC, in response to questioning from the panel, admitted that MPIC had never actually been prevented, by the Appellant's refusal to sign these particular forms, from obtaining the information they needed to continue managing her claim.

Section 160 of the Act sets out a discretion under which the Corporation may affect benefits, and the Commission, pursuant to Section 184(1), exercises a similar discretion in reviewing MPIC's actions on appeal.

Powers of commission on appeal

[184\(1\)](#) After conducting a hearing, the commission may

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

In *Dean v. MPIC, 2006 MBCA 97*, the Manitoba Court of Appeal dealt with a different discretionary power found elsewhere in part 2 of the Act. However, that case made it clear that

the Court of Appeal generally sees the Commission as the ultimate discretionary decision-maker under Part 2 of the Act. The Court noted, in paragraph [11] of *Dean v. MPIC*, supra that:

“The Commission, of course has been given the authority to make the final determination of what costs will be reimbursed by MPIC.”

Further the Court noted:

The idea seems to be to allow the Commission to make a pragmatic determination whether a claim for reimbursement falls under one of these headings, taking into account the particular circumstances surrounding the claim. It must be emphasized that the Commission is to exercise a discretion concerning these matters. The opening sentence of s. 10(1) states that the corporation “may provide the victim with any one or more of the following” (emphasis added). That discretion is re-emphasized under clause (d), where reimbursement is stated to be “at the sole discretion of the corporation.” Just because a particular item falls within the description of, for example, “communication aides” does not require the Commission to order reimbursement. I suppose that hearing aides could fall within the term “communication aides” and so might a laptop computer. But reimbursement for hearing aides would only be approved for a person who would profit from their use, and a laptop computer would be allowed only in a case of unique circumstances. These, however, are the kind of discretionary decisions that first MPIC, but ultimately the Commission, is called upon to decide. (paragraph 14)

In this way, it is within the Commission’s authority to take into account an Appellant’s reasons or explanation, before it comes to a final decision as to whether a suspension of benefits is warranted and should be upheld.

This panel finds (as did the panel in the [text deleted] case) that the Appellant refused or neglected to produce information when requested by the Corporation in writing. However, the Commission is of the view that, contrary to the submission of Counsel for MPIC, the Commission has the discretion to determine whether the overall circumstances before us warrant the decision to suspend the Appellant’s PIPP benefits for refusing or neglecting to provide the relevant forms.

In considering all of the circumstances surrounding MPIC's suspension of the Appellant's benefits, the panel has taken into account the validity (or lack thereof) of the forms which MPIC was asking the Appellant to sign. We find that this request to the Appellant did not comply with the legislation in Manitoba protecting rights to privacy and that MPIC cannot then rely on Section 160 of the MPIC Act to terminate the Appellant's benefits on account of her failure or refusal to sign these forms.

The panel does not accept MPIC's assertions that it was not aware that the Appellant's objections to the forms were based upon her concerns that they violated privacy laws. Nor do we accept the contention that no forms could be drafted that would be acceptable to the Appellant.

The deficiencies in the authorization forms and the Appellant's objections to them are relevant considerations in determining whether or not MPIC was justified in suspending the Appellant for her refusal to sign. We find that the concerns and objections of the Appellant, which were clearly expressed to MPIC, were the reason for her behavior in failing to sign the forms, and that, when all the circumstances are considered, MPIC was not justified in suspending her benefits.

Accordingly, the panel finds that the Appellant has established on a balance of probabilities that the circumstances in this case did not warrant MPIC's suspension of the Appellant's benefits between January 30, 2004 and May 2, 2005.

Section 150 Duty to Advise and Assist Claimants:

The Appellant has argued that the Corporation's failure to "advise and assist" the Appellant and "endeavour to ensure" that she is informed of and receives the compensation to which she is

entitled, has resulted in her failure to receive compensation under the Act. The Commission has been asked to determine whether the Corporation has acted in accordance with Section 150 of the MPIC Act and that this alleged failure has affected the Appellant's entitlement to compensation.

Corporation to advise and assist claimants

[150](#) The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The panel has reviewed MPIC's actions in dealing with the Appellant, and considered its responsibilities under Section 150 of the Act.

In particular, the panel has considered MPIC's failure to provide the Appellant with new, revised medical authorization release forms when changes to the forms were instituted in July of 2004. We have also examined MPIC's treatment of the Appellant and its consideration of her psychological state.

The panel heard evidence that MPIC changed the format and content of its release forms in July of 2004. The panel was also referred to two newspaper articles from the Winnipeg Free Press dated November 1, 2004 and February 7, 2005, which quoted various sources at MPIC as describing the change to their forms in July of 2004. The evidence regarding this change to the forms and its timing was not challenged by MPIC at the hearing. Accordingly, the evidence before the panel established that, although the forms were changed in 2004, the Appellant (in spite of her previous, strenuous objections to the content of the forms, and her suspension of

benefits for refusal to sign them) was not provided with new medical authorizations forms prepared by MPIC until February of 2005.

The panel is of the view that through this conduct, the Corporation failed to advise and assist the Appellant and endeavour to ensure that she was informed of and received the compensation to which she was entitled.

The panel also heard evidence regarding the Appellant's feelings of frustration and vulnerability and reviewed medical reports from [Appellant's psychotherapist] and [independent psychiatrist] which established that the Appellant suffered from a psychological disability and a vulnerable mental state.

MPIC's Psychological Consultant, [MPIC's psychologist], also reviewed the Appellant's file and the reports from [Appellant's psychotherapist] and noted:

“Based on review of the file documentation including the most recent report of August 6, 2008, it is the writer's opinion that the claimant has a number of chronic psychological conditions including dysthymia, recurrent depression, as well as a pain disorder. [Appellant's psychotherapist] also describes the claimant as having alexithymia and disability syndrome, both of which are not specific diagnostic entities according to the DSM-IV-TR...”

[Independent psychiatrist] reported to MPIC on September 12, 2005 and provided a diagnosis of Dysthymic Disorder of several years' duration.

“Based upon [the Appellant's] clinical presentation and a review of the medical reports provided, it would be my preferred diagnosis that [the Appellant] is experiencing a Dysthymic Disorder of several years duration. [The Appellant] has been chronically dysphoric, with her dysphoric mood having been described by various physicians and psychologists subsequent to the motor vehicle accident. There is clear fluctuation evident in [the Appellant's] symptom complex with this possibly being related to the presence of alexithymia as described by [Appellant's psychotherapist]. Although not a specific diagnosis, alexithymia refers to the difficulty individuals may have in identifying their particular affective state, which, in [the Appellant's] case, may have

led her to at times potentially minimize her symptoms when reporting to examining physicians. I also suspect that [the Appellant] is suffering from a Pain Disorder associated with both Psychological Factors (Dysthymic Disorder) and a General Medical Condition (Myofascial Pain). DSM-IV diagnoses would be as follows:

- Axis I** 1. Dysthymic Disorder
 2. Pain Disorder associated with Psychological Factors and a General Medical Condition
- Axis II** Obsessive and ? Narcissistic Personality Traits
- Axis III** Myofascial Pain
- Axis IV** Acrimonious relationship with MPI, financial stressors, pending litigation with MPI, [perceived] inability to work related to injuries sustained in a motor vehicle accident
- Axis V** Current GAF = 58-61

The above diagnoses are, in my opinion, a result of the motor vehicle accident [the Appellant] was involved in on October 27, 1998. The factors contributing to and perpetuating [the Appellant's] current symptoms have been alluded to in the above report. These have resulted in a chronic course of residual symptomatology which is approaching seven years in duration. Given the apparent presence of secondary gain issues, I would not anticipate additional significant clinical improvement of secondary gain issues, I would not anticipate additional significant clinical improvement until [the Appellant's] pending litigation issues with MPI have been resolved.

In my opinion, a diagnosis of alexithymia should not preclude [the Appellant] from participating or complying with a rehabilitation program.

Although I am unable to provide you with a definitive personality diagnosis, it was my clinical impression that [the Appellant] manifested a number of traits in the obsessive and narcissistic spectrum. These personality traits may have contributed to and potentially perpetuated what, from [the Appellant's] description, appears to be an evolving acrimonious relationship with MPI. These traits may also have contributed to [the Appellant's] delay in accepting certain treatment recommendations (i.e., prolotherapy)."

[Appellant's psychotherapist] provided several reports. On August 6, 2008, he noted:

"As mentioned in previous reports, [the Appellant] suffers from a variety of psychological conditions, including dysthymia, recurring major depression, chronic anger and anger management issues, and alexithymia (an impairment in emotional processing which in her case worsens under stress). Also mentioned in more recent reports, is the fact that [the Appellant] now suffers from Disability Syndrome."

[Appellant's psychotherapist's] diagnosis of the disability syndrome and psychological challenges facing the Appellant were also accompanied by a recommendation that in order to help a person to recover from this disability syndrome "...Litigation, if pending, should be resolved.", and "an explicit rehabilitation plan must be put in place to deal with all these barriers to workplace reintegration".

The Appellant's testimony and evidence showed that MPIC's continued refusal to acknowledge the validity of her privacy objections reinforced her feelings of vulnerability. Although the reports referred to above came after more recent reviews, the Appellant has been providing psychological medical reports to MPIC for many years. MPIC was fully aware of the Appellant's disability through its receipt of reports from [Appellant's psychotherapist], [independent psychiatrist] and [MPIC's psychologist]. However, instead of treating her carefully and accommodating this disability, MPIC continued in its failure to acknowledge the validity of her objections. Even with its awareness of her psychological state, MPIC was not responsive to the Appellant's needs. Rather, they became less responsive and more defensive in their dealings with her.

The panel finds that there had been an alternate arrangement for MPIC receiving medical information which had been in effect for a few years. At some point, it stopped working, for one reason or another. The facts regarding how and why this occurred are contentious. However, the panel heard evidence that the Appellant did not feel she had received adequate notice that this arrangement was coming to an end. She also felt that her concerns regarding her privacy were still not being addressed through any open, or successful, communication between the parties to resolve the issues. The panel finds that this was a breach of MPIC's duty to treat the Appellant fairly and in good faith to assist her with her claim and endeavour to ensure that she was

informed of and received the compensation to which she was entitled, in accordance with Section 150 of the MPIC Act. This failure, combined with MPIC's continued insistence upon the Appellant signing medical authorization release forms which did not comply with requirements for the protection of privacy and failure to provide her, in a timely manner, with the amendments to these forms prevented the Appellant from receiving the benefits to which she was entitled, through the suspension of her benefits between January 30, 2004 and May 2, 2005.

The Commission finds that through these actions, MPIC failed to fulfill its duty to the Appellant under Section 150 of the MPIC Act. We find that given the vulnerabilities of this particular claimant of which MPIC was aware, the Corporation needs to do more in order to fulfill its obligation to advise and assist her and to ensure that she is informed of and receives the compensation to which she is entitled under the Act.

Bad Faith, Malfeasance in Public Office and the Duty to Act in Good Faith:

Counsel for the Appellant also submitted that MPIC had committed various torts against the Appellant including bad faith, abuse of public authority, (public malfeasance), a violation of the duty of good faith, and of its fiduciary duty. He submitted that the real reason for suspending the Appellant, among other actions taken by MPIC, was to frustrate and provoke the Appellant. MPIC sought to provoke her to persist in her refusals so that MPIC could terminate her benefits, close her file and no longer have any liability to her for injuries suffered in her accident. He submitted that MPIC's actions formed the basis of a breach of fiduciary duty under the common law, as well as a breach of its duty to act in good faith.

Counsel for MPIC argued that the Commission does not have the jurisdiction to determine whether it has committed torts against the Appellant and that only the Court of Queen's Bench

has this jurisdiction. Further, Counsel submitted that the evidence does not support the existence of any of the elements of these torts.

Based upon the findings and decision set out above, the panel does not find it necessary to consider these other arguments made by Counsel for the Appellant. The role and jurisdiction of the Commission include reviewing the evidence, interpreting and applying the relevant provisions of the MPIC Act and Regulations and, after conducting a hearing, the Commission may, pursuant to Section 184(1) confirm, vary or rescind the Review Decision of the Corporation or make any decision that the Corporation could have made.

Powers of commission on appeal

[184\(1\)](#) After conducting a hearing, the commission may

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

The panel has found that MPIC was not justified in suspending the Appellant for her refusal to sign the medical authorization release forms and that in the continued failure to acknowledge the validity of her objections and her psychological state, MPIC failed in its duty under Section 150 of the MPIC Act to advise and assist claimants. As a result, it is not necessary to consider the tort claims made by the Appellant. Rather, the Commission finds that the decision of MPIC's Internal Review Officer dated May 11, 2004, resulting in the suspension of the Appellant's PIPP benefits from January 30, 2004 to May 2, 2005 should be overturned and the Appellant's appeal in this regard should be allowed. We find that the Appellant's PIPP benefits should be reinstated from January 30, 2004 to May 2, 2005 and refer the calculation and payment of these benefits back to the Appellant's case manager for determination, with interest in accordance with Section 163 of the MPIC Act. The Commission will retain jurisdiction in the event that the parties are

unable to agree to the quantum of benefits to which the Appellant will now be entitled to receive.

Reimbursement of Expenses:

The Appellant also seeks reimbursement for the following expenses:

- Airfare from [text deleted] - \$368.08
- Rerouting of mail - \$28.89
- [Text deleted] (photocopying) - \$8.78
- Queen's Printer (Purchase of MPI Regulations) - \$45.42
- Canada Post (XPress Post) - \$5.34
- [Text deleted] (photocopying) - \$11.52
- Redoxon & Daily One Vitamins - \$20.30
- [Text deleted] (photocopying) - \$8.90
- Canada Post (XPress Post) - \$5.34
- [Text deleted] (2 books & the Comp. water workout) - \$46.38
- [Text deleted] (Obus Form, gel & book) - \$121.73
- [Text deleted] (photocopying) - \$6.04
- [Text deleted] ("equipment") - \$69.59

Travel expenses:

- For the period 01 Nov 01 to 19 Apr 02 – 6 kms denied of the 312 kms submitted
- For the period 20 Apr 02 to 11 May 02 – 57 kms denied of the 433 kms submitted
- For the period 13 May 02 to 23 May 02 – 17 kms denied of the 432 kms submitted and \$1.00 for parking denied of the \$2.00 submitted
- Psychotherapy sessions with [Appellant's psychotherapist] covering the period 18 Feb 04 to 21 Jul 04 (both inclusive)
- Report from [Appellant's psychotherapist] to the Manitoba Human Rights Commission - \$250.00
- E-mail from [Appellant's psychotherapist] to Appellant's lawyer on 16 Apr 04 - \$112.50
- Report from [Appellant's psychotherapist] dated 12 May 04 at a cost of \$1,125.00 less the \$250.00 allowed

After receiving the reports from [Appellant's psychotherapist], [independent psychiatrist] and [MPIC's psychologist], and prior to the hearing of the Appellant's appeals, MPIC reimbursed her for the cost of much of her psychotherapy treatment with [Appellant's psychotherapist]. However, reimbursement for psychotherapy sessions with [Appellant's psychotherapist] were not allowed for the period between February 18, 2004 and July 21, 2004, as the Appellant was suspended from receiving PIPP benefits during this period. Accordingly, only treatment benefits

for this period are still in issue.

Counsel for MPIC reviewed sections of the MPIC Act and Regulations relating to the other listed expenses. In particular, she reviewed Section 19 and 25 of Manitoba Regulation P215- 40/94.

Travel and accommodation

19 Subject to sections 20 to 29 and Schedule B, the corporation shall pay travel or accommodation expenses incurred by a victim for the purpose of receiving care.

Transportation by air

25 The corporation shall pay an expense incurred by the victim for air transportation if
 (a) other available means of transportation are inadequate or dangerous because of travel time or road or weather conditions; or
 (b) air transportation is less expensive than other available means of transportation.

Counsel submitted that there is no coverage under the Act and Regulations for airfare and air travel which is not for the purpose of receiving care.

She also noted that coverage for expenses must be set out specifically in the Act or Regulations and that there is no coverage set out for re-routing mail, photocopying, purchasing copies of MPIC Regulations or Xpress Post expenses.

Coverage for medical expenses such as medicines, water workouts, Obus form or Speedo Fitness Equipment is only provided where these items are medically required for treating a condition resulting from the motor vehicle accident.

MPIC Act:

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;

(b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care would be reimbursed under The Health Services Insurance Act if the care were dispensed in Manitoba.

Counsel for MPIC submitted that the evidence did not establish that any of the items listed were medically required and as such, there is no entitlement to reimbursement.

Further travel expenses claimed were also not incurred for the purpose of receiving care, nor was a parking expense for the purpose of picking up a cheque from MPIC considered to be for medical treatment.

Counsel also submitted that while certain treatment expenses with [Appellant's psychotherapist] were or had been entitled to reimbursement, any reports obtained from [Appellant's psychotherapist] in regard to the Internal Review or Commission hearings had been compensated in accordance with the \$250.00 allowed pursuant to Section 43 of Regulation 40/94.

Accordingly, Counsel for MPIC submitted that the Appellant had not established an entitlement under the Act or Regulations for the claimed expenses.

The panel has reviewed the submissions of the parties regarding entitlement to these benefits under the MPIC Act. With the exception of reimbursement for the psychotherapy sessions with [Appellant's psychotherapist], the panel finds that the Appellant has failed to show on a balance of probabilities that there was medical evidence and statutory or regulatory authority establishing an entitlement to these benefits. Accordingly, with the exception of the payment of benefits for [Appellant's psychotherapist's] treatment of the Appellant during the period of her suspension, the Appellant has failed to show, on a balance of probabilities, that the Internal Review Officer erred in finding that she was not entitled to receive these benefits. Accordingly, the Internal Review Decisions of February 3, 2005 and May 5, 2005 are hereby upheld.

Reimbursement of the Appellant for expenses incurred during psychotherapy sessions with [Appellant's psychotherapist] during the period from February 18, 2004 to July 21, 2004 shall be paid to the Appellant and calculated by the Appellant's case manager with interest, when determining the Appellant's entitlement arising out of her appeal of the May 11, 2004 Internal Review Decision regarding her suspension.

Dated at Winnipeg this 5th day of October, 2009.

LAURA DIAMOND

NEIL COHEN

LORNA TURNBULL