Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-015

PANEL:	**Ms Jacqueline Freedman, Chair** **Mr. Trevor Anderson** **Ms Janet Frohlich**
APPEARANCES:	**The Appellant was represented by Mr. Paulo Arruda of the Claimant Advisor Office;** **Manitoba Public Insurance Corporation ("MPIC") was represented by Ms Jaime Rosin.**
HEARING DATE(S):	**July 16, 2019** **Additional Submission from MPIC received August 23, 2019** **Additional Submission from the Appellant received in reply October 4, 2019**
ISSUE(S):	**Whether the Appellant is entitled to reimbursement for the expense incurred to replace his CPAP machine.**
RELEVANT SECTIONS:	**Section 136 of The Manitoba Public Insurance Corporation Act ("MPIC Act") and sections 34 and 36 of Manitoba Regulation 40/94.**

Reasons For Decision

Background:

[Text deleted] (the "Appellant") was involved in a motor vehicle accident (the "MVA") on August 10, 2017. The Appellant sustained minor injuries as a result of the MVA and as a result he sought benefits under the Personal Injury Protection Plan ("PIPP") provisions of the MPIC Act.

At the time of the MVA, the Appellant was travelling out of town. He had in his car his portable CPAP machine, in the trunk. He used the CPAP machine because he had, years earlier, been diagnosed with obstructive sleep apnea ("OSA"), and he was required to use the CPAP machine every night to treat the OSA. As a consequence of the MVA, the portable CPAP machine was damaged. After the MVA, the portable CPAP machine did not work, and was not able to be repaired. The Appellant eventually purchased a new portable CPAP machine and sought reimbursement from MPIC for the cost of the new machine.

MPIC considered the Appellant's request. The case manager issued a decision letter dated September 15, 2017, which provides, in part, as follows:

> As previously advised, there is no entitlement for the repair or replacement expenses of the damaged CPAP machine under the Personal Injury Protection Plan (PIPP) …

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager, and issued an Internal Review decision dated December 6, 2017, which provides, in part, as follows:

> The replacement of your CPAP machine was not required as a result of your injuries from the motor vehicle accident nor does it qualify under the pre-accident items listed in the legislation. Therefore, there is no entitlement to be reimbursed for this expense.
>
> The decision under Review correctly declined to reimburse this expense. The Personal Injury Protection Plan ("PIPP") is, in effect, an insurance policy created by the *Act* and its Regulations. This insurance policy, like all insurance policies, carefully defines the types of losses it covers. The plan does not cover every sort of loss that might conceivably flow from a motor vehicle accident.
>
> Giving consideration to all information on your file, I agree with the case manager's decision and conclude that MPI does not have an obligation to consider funding for the CPAP machine.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission.

Issue:

The issue which requires determination on this appeal is whether the Appellant is entitled to be reimbursed for the expense incurred to replace his CPAP machine that was damaged in the MVA.

Decision:

For the reasons set out below, the panel finds that the Appellant has failed to establish, on a balance of probabilities, that he is entitled to be reimbursed for the expense incurred to replace his CPAP machine that was damaged in the MVA.

Procedural Matters:

The evidence at the hearing consisted of the 16 documents on the indexed file. The Appellant was the only witness.

Both parties provided oral arguments in support of their positions at the hearing. In addition, at the hearing, counsel for the Appellant provided a written submission, together with three authorities referred to in the submission. Prior to commencing argument, we adjourned the hearing for approximately a half hour, to allow counsel for MPIC, as well as the panel, the opportunity to review the written submission and the authorities provided by counsel for the Appellant.

Following the conclusion of the hearing that was held on July 16, 2019, the panel convened to consider its decision in this matter and determined that additional information was required from the parties. We requested a written submission from MPIC and a written submission in reply from the Appellant. Once those submissions were received, the panel convened again, and a decision was reached in this matter.

Legislation:

The relevant provision of the MPIC Act is as follows:

> **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:
> …
> (b) the purchase of prostheses or orthopedic devices;
> (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
> (d) such other expenses as may be prescribed by regulation.

Manitoba Regulation 40/94 (the "Regulation") provides, in part, as follows:

> **Prescribed appliance, medical equipment, clothing**
>
> **34** Subject to sections 35 to 37 and Schedule B, the corporation shall pay an expense incurred for the purchase, rental, repair, replacement, fitting or adjustment of clothing or a medical appliance or medical equipment if the expense is incurred for a medical reason related to the accident, and on the prescription of a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist, athletic therapist, nurse practitioner, clinical assistant or physician assistant.
>
> **…**
>
> **Where victim did not wear or use object before accident**
>
> **35** Where an expense is incurred under section 34 or 34.1 for an object the victim did not wear or use before the accident, the corporation shall not pay the expense unless it is incurred
>
> (a) owing to a changing condition resulting from the accident;
> (b) owing to ordinary usage of the object;
> (c) in order to enhance the performance of the object.
>
> **Where victim wore or used object before accident**
>
> **36** Where an expense is incurred under section 34 or 34.1 for an object the victim wore or used before the accident, the corporation shall pay the expense only once, unless an expense is incurred owing to a change in a condition that results from the accident, in which case the corporation shall pay the expense.

Where cost of repair does not exceed 80% of purchase price

37 Notwithstanding sections 35 and 36, the corporation shall not pay an expense incurred by a victim for the repair of an object referred to in section 34 to the extent that the expense exceeds 80% of the price that was paid for the object.

Evidence for the Appellant:

The Appellant testified at the appeal hearing, and was also cross-examined by counsel for MPIC.

The Appellant described the circumstances of the MVA. He noted that his back was injured as a result of the MVA. As well, the CPAP machine, which was in the trunk, was damaged. It was in the car because he was on his way out of town. The Appellant said it was a requirement of his driver's license that he use the CPAP machine at night. It was prescribed for him by his doctor. If he doesn't use the CPAP machine, he is prone to fall asleep, and he also gets grouchy.

When the Appellant brought the damaged CPAP machine in for repair, he was told it couldn't be repaired, so he purchased another one. He has two CPAP machines; one is for travelling, and one is for home use. He sought reimbursement from MPIC for the cost to replace his damaged portable CPAP machine. He obtained two cost estimates, one from [CPAP provider # 1] and one from [CPAP provider # 2]. He has a [CPAP provider # 1] machine at home, but it doesn't travel very well. The [CPAP provider # 2] machine is preferable for travel use. The estimate from [CPAP provider # 2] was approximately $2200.

The Appellant said that MPIC declined to reimburse him. They said that since he only uses the CPAP machine while at home sleeping, not when driving, he should claim reimbursement under his home insurance. On cross-examination, the Appellant confirmed that he used the CPAP machine only while sleeping. He had been prescribed the machine at least a dozen years ago.

Counsel for MPIC confirmed with the Appellant that at the time of the MVA, he owned two CPAP machines, one for home use and one for travelling. When questioned regarding whether he could have used his home CPAP machine immediately after the MVA, the Appellant noted that on the night of the MVA, he was out of town, so he could not use his home machine. However, when he returned home the next day, he resumed use of his home CPAP machine. He did purchase another portable CPAP machine, approximately six months after the MVA. The Appellant confirmed that he uses the CPAP machine now in the same way as he did prior to the MVA, for the same medical reason. In response to questions from the panel, the Appellant confirmed that he did buy the CPAP machine from [CPAP provider # 2] and he is looking for reimbursement in the amount of $2200.

In response to questions from counsel for MPIC, the Appellant said that he was not able to explain exactly how the CPAP machine was damaged, other than that it was in the trunk and it was damaged as result of the MVA. When he transports the new machine now, he places it in the back seat of the vehicle, buckled in the middle. He does not have any documentation confirming that the CPAP machine was not able to be repaired. He was told that CPAP machines are replaced rather than repaired. He said that the CPAP machine which was damaged had been purchased from [CPAP provider # 2], although he did not remember what model it was. He thought that he may have submitted his original purchase documentation for that machine to MPIC, but he could not be certain. He did not make a claim for the loss of the damaged CPAP machine under his home insurance.

Submission for the Appellant:

As indicated, counsel for the Appellant provided oral argument and a written submission at the hearing, and also provided a further written submission at the panel's request, which was appreciated.

Counsel pointed to the documentary evidence from the Appellant's physicians, which established his requirement for the CPAP machine. Because the Appellant is required to use the CPAP machine nightly, every time he travels he brings his portable CPAP machine with him. Counsel pointed out that it is not disputed that the CPAP machine was damaged in the MVA. It is the Appellant's position that he is entitled to be reimbursed for the expense incurred to replace his CPAP machine pursuant to section 36 of the Regulation.

Section 36 provides for reimbursement of an expense where the victim wore or used the object before the accident, and that is exactly the circumstance here. Counsel acknowledged that section 36 does refer to section 34 of the Regulation, in that it begins with the phrase "[w]here an expense is incurred under section 34 …" However, he argued that the reference to section 34 is intended merely to specify what sort of objects or equipment are to be reimbursed, specifically "clothing or a medical appliance or medical equipment", but it is not intended to require that, in order to be reimbursed under section 36, an expense must first meet all of the other conditions contained in section 34 of the Regulation.

Counsel noted that this interpretation of section 36 is logical. He referred the panel to the decision of the Commission in AC-06-31, which involved the interpretation of section 35 of the Regulation. In that case, at paragraph 19, the Commission noted that it was important to avoid an illogical interpretation. Counsel argued that construing the reference to section 34 as limiting section 36 to "clothing or a medical appliance or medical equipment" is important, because this excludes non-medical devices such as laptops or radios. But he pointed out that it does allow MPIC to reimburse medical appliances and medical equipment. Counsel argued that otherwise, MPIC would have no means of reimbursing accident victims for items such as their eyeglasses which are damaged in an accident, as there is no express provision in the Regulation dealing with the reimbursement of

eyeglasses. He submitted that it would appear that MPIC is applying section 36 of the Regulation to grant reimbursement for prescription glasses worn by claimants before an accident. He argued that the Appellant should be entitled to the benefit of the same interpretation of section 36 with respect to reimbursement of the expense incurred to replace his CPAP machine.

Counsel also relied upon section 6 of the Interpretation Act, to argue that section 36 should be given a liberal interpretation. That section states as follows:

> **Rule of liberal interpretation**
>
> **6** Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

He also pointed out the difficulty with an interpretation of section 36 of the Regulation which would require an expense to first meet all of the conditions of section 34. This is because section 36 deals with objects worn or used before the MVA, while section 34 deals with expenses which are incurred "for a medical reason related to the accident", and thus necessarily incurred after the accident. He argued that section 36 of the Regulation's two distinct parts should be read separately, as follows:

> **Part 1:** Where an expense is incurred under section 34 or 34.1 for an object the victim wore or used before the accident, the corporation shall pay the expense only once
>
> **Part 2:** unless an expense is incurred owing to a change in a condition that results from the accident, in which case the corporation shall pay the expense.

Part 1, it was argued, should be interpreted without reference to the requirement that the expense be incurred for a medical reason related to the accident, that is, it should not require the existence of an MVA-related injury. Part 2, it is clear, does require an MVA-related injury as a condition of reimbursement. The Appellant's expense falls under Part 1.

The panel was also referred to an earlier decision of the Commission in AC-96-12, where the Commission noted that to the extent that a particular statutory provision in that case was felt to be ambiguous, the application of the *contra proferentem* rule gave further strength to the position of the appellant. Counsel also referred to a decision of the BC Supreme Court in support of this argument. Counsel submitted that a favourable interpretation should therefore be allowed to the Appellant here on the grounds of the *contra proferentem* rule.

In the alternative, counsel argued that the Appellant's use of his CPAP machine was required by him in order to comply with a condition of retaining his driver's license, and the expense incurred to replace it should be reimbursed to him on that basis.

The Appellant's family doctor regularly submits reports in compliance with subsection 157(1) of the Highway Traffic Act and subsection 18(1) of the Drivers and Vehicles Act. He pointed to a one such report, dated September 24, 2018, as an example. Counsel submitted that failure to submit the reports or to comply with the listed treatment could cause suspension or cancellation of the Appellant's driver's license under the relevant legislation. The CPAP machine is considered the most effective treatment for OSA and is, it was argued, medically required for the Appellant to drive.

MPIC regularly reimburses victims for costs incurred to replace eyeglasses, which are often noted as restrictions on driver's licenses. By analogy, MPIC should similarly reimburse victims for costs incurred to replace other medical devices which are required due to driver's license restrictions, and the Appellant's CPAP machine meets that criteria.

Therefore, counsel submitted that section 36 of the Regulation authorizes MPIC to reimburse the Appellant for the expense incurred to replace his CPAP machine that was damaged in the MVA, in light of section 6 of the Interpretation Act and the *contra proferentem* rule, or alternatively by analogy due to a restriction on his driver's license.

Submission for MPIC:

As noted, in addition to oral argument at the hearing, counsel for MPIC provided a written submission at the panel's request, which was appreciated.

Counsel for MPIC submitted that the Appellant is asking the Commission to stretch the Regulation beyond the breaking point. Although the CPAP machine had a medical purpose, it was simply a piece of technology that he was carrying in his trunk from one place to another when it got damaged. He used it prior to the MVA, and his use of it, and his need for it, were not changed by the MVA. It was not being used at the time of the MVA, nor was it required to be in the car. He had two CPAP machines at the time of the MVA, and he testified that he did not purchase a replacement portable machine for six months, as he had a second machine at home and used it until he purchased a new portable CPAP machine six months after the MVA.

Counsel submitted that section 36 of the Regulation must be read together with section 34, and that the informing language of section 34 requires that the expense must be incurred for a medical reason related to the accident. An expense incurred to replace a CPAP machine which is broken because it was jostled in the trunk does not meet this requirement.

The panel was referred to an earlier decision of the Commission, AC-07-02, which discusses the principles of statutory interpretation set out in *Pelchat v. Manitoba Public Insurance Corporation*, 2007 MBCA 52. Counsel pointed out the general principle:

> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

Counsel also referred to the Commission's decision in AC-01-69, which cited the Supreme Court of Canada in *R v. McGraw*, [1991] 3 S.C.R. 72, to state that "[i]t is well settled that words contained in a statute are to be given their ordinary meaning. …"

Counsel submitted that the meaning of section 34 of the Regulation is clear, in that it clearly states that, in order to be reimbursed, the expense must be incurred for a medical reason related to the accident. It was argued that the inclusion of this limitation informs the entirety of the section. There is no dispute as to the meaning of section 34.

The dispute surrounds what part of section 34 is intended to be included in the reading of section 36 of the Regulation. It is MPIC's submission that the interpretation which best supports the principle of "ordinary reading" is one that reads the entirety of section 34 into section 36. Counsel submitted that the opening words of section 36, "[w]here an expense is incurred under section 34" is plain in its meaning, and requires that the reader must refer back to section 34 in its entirety. This interpretation follows the plainest reading of the statute, an approach which is supported by the courts and the Commission.

Counsel for MPIC argued that conversely, the approach to the reading of section 36 of the Regulation put forward by the Appellant requires that only a portion of section 34 be read, and that

another part of section 34, arguably the informing part of the section, the requirement that the expense be incurred for "a medical reason related to the accident", be entirely disregarded. She argued that it would be contrary to the principle of "ordinary reading" to refer to a portion of section 34 while other portions of section 34 are ignored if there is no indication that this is the intent of the drafters. If the drafters of the Regulation had intended for the opening words of section 36 to only act as a limit on the types of objects referred to in section 34, they could have specifically said so, but they did not.

It is helpful to look at how an interpretive approach would affect the interpretation of section 35, counsel argued, as section 35 contains the same opening words as section 36 of the Regulation. If the reference to section 34 is only meant as a limitation as to the type of objects to which this section applies, then section 35 could have very broad application. For example, under subsection 35(b), a medical device not used before the accident would be required to be replaced by MPIC "owing to ordinary usage of the object", even if there was no medical connection to the accident. However, counsel noted that in AC-06-31, a case referred to by counsel for the Appellant, the Commission, when interpreting sections 34 and 35 of the Regulation, noted at paragraph 17 the necessity of an accident-related injury in order for reimbursement of the expense to be made. Thus, in order for section 35 to make sense, the entirety of section 34 must apply. This must therefore also be the approach that is taken to the interpretation of section 36.

Counsel noted that sections 34 through 37 are intended to be read together, as part of a larger scheme of reimbursement. There is no ambiguity created by the reference to section 34 in section 36. Counsel referred to other examples in the Regulation where groups of provisions cross-reference each other, and noted that it is a common drafting practice to create a scheme which operates in this way.

The legislation is clear. In order for the Appellant to be entitled to reimbursement for an expense under section 36 of the Regulation, the expense must be incurred for a medical reason related to the accident pursuant to section 34. Here, it is admitted that the medical condition which necessitated the Appellant's use of the CPAP machine is not connected to any accident. Reimbursement for the expense incurred to replace his CPAP machine is therefore not covered under the Regulation.

There is nothing in the Regulation that allows for reimbursement by means of analogy or by virtue of a restriction on a driver's license. If there is no bodily injury caused by the accident, then reimbursement will not be found under the Regulation, and the individual could make a claim under their homeowner's insurance policy. Section 6 of the Interpretation Act cannot remove the requirement for a medical connection to the accident, it is just there to help the legislation attain its objects.

Finally, counsel noted that the Appellant is seeking reimbursement for the expense incurred to replace his CPAP machine. She pointed out that although the Appellant testified that his CPAP machine could not be repaired, he did not produce a report from any provider to support his testimony. Further, there are two estimates, but no receipts, for replacement CPAP machines in evidence, one for $1225 and the other for $2240. The Appellant's explanation was that he preferred the more expensive machine because it travelled better. She argued that if the Commission did find for the Appellant, the lower amount should be awarded.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to be reimbursed for the expense incurred to replace his CPAP machine that was damaged in the MVA. In making our decision, as set out below, the panel has carefully reviewed all of the documentary evidence filed in connection with this appeal. We have given careful consideration to the testimony of the Appellant and to the submissions of counsel for the Appellant and of counsel for MPIC. We have also taken into account the provisions of the relevant legislation and the applicable case law.

The Appellant's Need for the CPAP Machine

There is no dispute that the Appellant suffered from obstructive sleep apnea ("OSA"). He was diagnosed as having OSA by a sleep study conducted on November 5, 2004. By letter dated December 20, 2004, his physician recommended CPAP therapy as the best option to treat his OSA. It is therefore clear that his requirement for a CPAP machine significantly predated the MVA of August 10, 2017. His OSA was not exacerbated by the MVA and the Appellant does not suggest that his need for the CPAP machine was in any way related to the MVA. Rather, he was travelling out of town and, anticipating his need for the CPAP machine that evening, he simply had the CPAP machine in his trunk.

Both parties agree that the CPAP machine was damaged in the MVA. The Appellant testified that he eventually replaced the damaged CPAP machine, as he was told by the provider that it was not able to be repaired. He testified that he incurred an expense for the replacement machine in the amount of $2200, for which he is seeking reimbursement.

The Positions of the Parties

The Appellant argues that he is entitled to be reimbursed for the expense incurred to replace his CPAP machine, pursuant to the provisions of section 36 of the Regulation, and that its interpretation ought not to be limited by all of the requirements of section 34. He also argues that ambiguous provisions of the MPIC Act should be construed against MPIC. In the alternative, the Appellant argues that if reimbursement cannot be made under section 36, then reimbursement should nevertheless be made under the Regulation because the CPAP machine is required by the Appellant in order for him to comply with his driver's license requirements.

MPIC argues that the Appellant's proposed interpretation of section 36 cannot stand. MPIC argues that section 36 of the Regulation should be interpreted in accordance with its plain and ordinary meaning, and this requires looking at the context in which it falls within the Regulation. Section 34 of the Regulation requires that for an expense to be reimbursed under section 36, it must have been incurred for a medical reason related to the accident, which is not the case here. The legislation is not ambiguous.

The Commission's Interpretation of the Legislation

Under paragraph 136(1)(d), a victim is entitled "to the reimbursement of expenses incurred by the victim because of the accident", including such expenses as may be prescribed by regulation. If reimbursement is to be made to the Appellant, it must be made under section 36 of the Regulation (the Appellant's argument with respect to a driver's license restriction will be addressed below).

Section 36 is the provision in the Regulation which deals with objects worn or used by the victim before the accident. Clearly, the Appellant's CPAP machine was an object used by him prior to the MVA. However, it must be noted that section 36 does not stand in isolation within the

Regulation. Rather, section 36 falls within a group of sections, sections 34 to 37, which deal with the reimbursement of expenses incurred "for the purchase, rental, repair, replacement, fitting or adjustment of clothing or a medical appliance or medical equipment …" as set out in section 34 of the Regulation. That section 36 of the Regulation falls within this group of sections is clear from its opening words: "Where an expense is incurred under section 34 or 34.1 …" Section 35 of the Regulation begins the same way. Sections 34 itself provides that it is "[s]ubject to sections 35 to 37 and Schedule B".

This appeal is essentially about the proper interpretation of, and interaction between, sections 34 and 36 of the Regulation.

As noted by counsel for MPIC, the Manitoba Court of Appeal, in *Pelchat v. Manitoba Public Insurance Corporation*, 2007 MBCA 52, has provided guidance regarding the general principles of statutory interpretation, as follows (at paragraphs 36 and 37):

> Before proceeding to answer the questions raised on this appeal it is useful to quickly review the general principles of statutory interpretation. The principle was set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, as follows (at para. 21):
>
> > Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> In this context it is also useful to recollect what Freedman J.A. said of the *Act* in *Menzies* (at para. 36):

> Words in a statute are to be given "the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction" (R. v. D.A.Z., 1992 CanLII 28 (SCC), [1992] 2 S.C.R. 1025 … at p. 1042 [S.C.R.]). The Act is intended to provide compensation based on "real economic loss" (Bill 37, The Manitoba Public Insurance Corporation Amendments and Consequential Amendments Act, Manitoba, 1993), and see McMillan v. Thompson (Rural Municipality) (1997), 1997 CanLII 11522 (MB CA), 115 Man.R. (2d) 2 … (C.A.), where Helper, J.A., said the legislature in the Act: "created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile" (at para. 54).

Thus, in construing the meaning of section 36 of the Regulation, we are required to look at it not in isolation, but rather to interpret its words in the context of the scheme of the MPIC Act, and as well having regard to the purpose of the MPIC Act. This will also require us to look at section 34 of the Regulation.

As stated above, the opening words of section 34 are: "Subject to sections 35 to 37 and Schedule B". In *Menzies v. MPIC*, 2005 MBCA 97, referred to in *Pelchat* above, the Court of Appeal also had to consider the interpretation of the MPIC Act and its regulations. In particular, in *Menzies*, the court was concerned with the interaction of two provisions (in that case, the first provision was in the MPIC Act, and the second provision was in the Regulation). The court considered the meaning of the phrase "[s]ubject to the regulations" in the first provision and determined, at paragraph 47, that this phrase is:

> … a phrase which, according to Dreidger, and in an interpretive approach which is logical, means something like: "subject to any limitations on the exercise of the powers herein set out, expressed or implied in the regulations."

Based on this analysis, we determine that section 34 of the Regulation is the primary section, to be consulted first when assessing whether an expense incurred for the purchase, rental, repair or replacement of clothing, a medical appliance or medical equipment would be reimbursed, subject to any limitations on the reimbursement imposed by section 35, section 36, section 37 or Schedule

B. Therefore, as the first step to determine whether reimbursement is available, the expense must first meet the conditions required by section 34 of the Regulation, which are as follows:

1. The expense must be incurred for the purchase, rental, repair, replacement, fitting or adjustment of clothing or a medical appliance or medical equipment; and

2. The expense must be incurred for a medical reason related to the accident; and

3. The expense must be incurred on the prescription of a physician, dentist, optometrist, chiropractor, physiotherapist, registered psychologist, athletic therapist, nurse practitioner, clinical assistant or physician assistant.

If all of the above three conditions are met, then reimbursement can be made under section 34 of the Regulation, unless there are any limitations on the reimbursement set out in any of sections 35, 36, 37 or Schedule B.

Section 36 of the Regulation begins "[w]here an expense is incurred under section 34 …", and then goes on to provide a limitation on the reimbursement of that expense in circumstances where the victim wore or used an object before the accident. Section 36 only applies in respect of an expense that falls within the provisions of section 34.

The Appellant acknowledged that his OSA was not in any way affected by the MVA and he did not argue that his medical need for the CPAP machine was related to the MVA. Thus, the Appellant's expense incurred to replace his CPAP machine that was damaged in the MVA was <u>not</u> incurred for a medical reason related to the accident. Accordingly, no reimbursement could be made under section 34 of the Regulation, and section 36 of the Regulation is therefore inapplicable.

The Appellant argues that reimbursement should be available under section 36 of the Regulation. He argues that when considering the opening words "[w]here an expense is incurred under section 34 …" of section 36, only the first condition required by section 34 should be necessary. In other

words, for objects worn or used by the victim before the accident, it should not be a requirement that the "expense incurred" meet either the condition that the expense be incurred for a medical reason related to the accident, or that the expense be incurred on the prescription of a physician or other medical professional. However, for this to be the correct interpretation, the opening words of section 36 would have to be construed so that they read, in effect, something like "where an expense is incurred for an item which is the subject matter of section 34". But that is not what section 36 says, and we cannot accept the Appellant's interpretation of it. Giving section 36 its plain and ordinary meaning, consistent with the scheme of the MPIC Act, which in our opinion is unambiguous, requires that section 36 will only apply to those expenses which first meet all of the conditions of section 34.

This is also consistent with the purpose of the MPIC Act, as identified above in *Menzies*, which is to provide "compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile". As indicated above, section 34 has, as one of its conditions, a requirement that the expense must be incurred for a medical reason related to the accident. To omit this requirement from an interpretation of section 36 would be to ignore the purpose of the MPIC Act, by allowing expenses to be reimbursed without the requirement of a medical connection to the accident (i.e. without an MVA-related injury). Therefore, a proper interpretation of these sections requires that section 36 cannot stand alone; rather, an expense must first meet all three conditions of section 34 of the Regulation prior to a determination of whether the expense would then be subject to reimbursement under section 36.

The Appellant had argued that where the legislation was ambiguous, rules of interpretation should apply to cause the Commission to construe the legislation in his favour. It is our view that the legislation in question is not ambiguous, in that it is clear that section 36 does not apply unless all

of the conditions of section 34 are first met. We acknowledge, however, that the wording of section 36 itself may be difficult to interpret. Given that on the facts of this case, we have found that section 36 is not applicable, we leave its interpretation to another day.

The Appellant had argued that it would appear that MPIC is applying section 36 of the Regulation to grant reimbursement for prescription glasses worn by claimants before an accident. Given this assumption, the Appellant argued that this should assist the Commission in interpreting section 36 in the Appellant's favour. Both the decision of the case manager and the decision of the Internal Review Officer acknowledge that MPIC does reimburse prescription glasses that were worn by claimants before an accident. However, we note that those decisions do not identify the legislation upon which MPIC relies to grant the reimbursement, and we are unaware of the authority on which they rely. In any event, the reimbursement for eyeglass expenses is not in issue in this case, and we do not want to speculate as to the provision under which MPIC is reimbursing claimants for their prescription eyeglasses. There is no evidence before us as to MPIC's policies or procedures in respect of the reimbursement of expenses for the repair or replacement of prescription eyeglasses, and the Appellant has not established that the reimbursement is made under section 36 of the Regulation. Whether or not MPIC reimburses expenses for prescription eyeglasses, this cannot assist us in interpreting section 36 of the Regulation.

Driver's License Restriction

The Appellant testified that his use of the CPAP machine at night was a "requirement of his driver's license". However, counsel for the Appellant could not point to any documentary evidence which confirmed this testimony. In his submission, counsel referred to a document entitled Medical Examination Report dated September 24, 2018, and argued that this identified OSA as a restriction on the Appellant's license. However, we note that this document is a standard form with

boxes to be filled in, which was completed pursuant to subsection 18(1) of The Drivers and Vehicle Act. Under that provision, MPIC may require a driver's license holder to be examined, and a physician aware of the driver's medical history must complete the form and return it to MPIC. The form in question, which we note is dated one year after the MVA, identifies numerous medical conditions afflicting the Appellant, including myocardial infarction, diabetes mellitus, OSA, and asthma. With respect to OSA, the form indicates that the Appellant's OSA is treated and that there is no daytime sleepiness. There is no indication on the form as to which medical condition necessitated its filing; nor is there any indication that failure to comply with treatment for any of the listed medical conditions would cause the Appellant to lose his driver's license. In fact, the Benefit Administration Unit, in its decision letter to the Appellant dated September 15, 2017, states that "a CPAP machine is not … listed as a restriction on your driver's license". Thus, we find that the Appellant has not established that his use of the CPAP machine was required in order for him to comply with a restriction on his driver's license.

In any event, even if the Appellant's use of the CPAP machine was a restriction on his driver's license, the Appellant has not established how that would entitle him to reimbursement for the expense in question. We are not aware of a provision in the MPIC Act or the Regulation which expressly permits the reimbursement of expenses incurred solely for the purpose of repairing or replacing medical devices required by the victim of an accident in order for the victim to comply with a driver's license restriction (i.e. absent a medical reason related to the accident).

Conclusion

Based on our interpretation of the legislation, as well as on the Appellant's evidence, the Commission finds that Appellant has failed to establish, on a balance of probabilities, that he is

entitled to be reimbursed for the expense incurred to replace his CPAP machine that was damaged in the MVA.

Disposition:

Accordingly, the Appellant's appeal is dismissed and the Internal Review decision dated December 6, 2017, is upheld.

Dated at Winnipeg this 21st day of November, 2019.

JACQUELINE FREEDMAN

TREVOR ANDERSON

JANET FROHLICH