# Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]**
**AICAC File No.: AC-00-51**

| | |
|---|---|
| **PANEL:** | **Mr. J. F. Reeh Taylor, Q.C., Chairman**<br>**Ms. Yvonne Tavares**<br>**Mr. Leslie Cox** |
| **APPEARANCES:** | **The Appellant, [text deleted], appeared on her own behalf, accompanied by her son;**<br>**Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Joan McKelvey.** |
| **HEARING DATE:** | **September 21, 2000** |
| **ISSUE:** | **Whether Appellant fit to resume former employment when Income Replacement Indemnity ('IRI') terminated.** |
| **RELEVANT SECTIONS:** | **Sections 107, 109 (1) and (2), 110 (1) (a) and (d), 110 (2) (d) and 115 of the MPIC Act, and Section 8 of Manitoba Regulation No. 37/94 (copies of which are annexed hereto).** |

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.**

## Reasons For Decision

**THE FACTS:**

[The Appellant] had been working as a housekeeper at [text deleted] for about eight and one-half years when, on February 16, 1996, the front of the vehicle in which she was a front-seat passenger collided with another vehicle. She estimates that she was travelling at about forty kilometers per hour.

[The Appellant] attended upon her family physician, [text deleted], the following day. He diagnosed "post-traumatic headaches, strain to lower back, neck and both shoulders, contusion to both knees, nervous shock". He arranged for an x-ray of [the Appellant's] lumbar spine, prescribed a muscle relaxant and an analgesic, and referred [the Appellant] to physiotherapy. He anticipated that she would need therapy three times per week for two months and gave his opinion that she was unfit to do any bending or lifting. He felt that this disability was temporary and would last for about a month.

Since [the Appellant's] work at [text deleted] required quite a lot of bending and lifting, it was apparent that she was unable to return to work at that point. MPIC started paying her Income Replacement Indemnity in the amount of $645.53 bi-weekly.

[Appellant's doctor's] next report, dated May 12, 1996, reiterated his earlier diagnosis and added "pain in lower back radiating down left leg". He had requisitioned a CT Scan of [the Appellant's] lumbar region and had referred her to [text deleted], a neurologist. He prescribed the same medication as before, plus physiotherapy four times per week for another two months.

[Appellant's neurologist], in a report to [the Appellant's] case manager at MPIC dated July 24, 1996, says in part:

> "The neck pain and headaches were improving with physiotherapy. The low back pain, however, was not improving……. The back pain radiates down the left leg to the ankle, and the right leg, to the knee. It was worse with walking……. Range of motion of [the Appellant's] back was reduced to about 70% of normal on flexion and extension; neck had a reduced range of motion to about 70% of normal in all directions……. Straight-leg raising was 60% on the left, causing typical sciatic type pain and 70% on the right causing sciatic pain to the knee. Otherwise strength, sensation, reflexes, and plantar responses were normal.
>
> The CT Scan ordered by [Appellant's doctor] showed moderate central spinal stenosis at the

> L4-5 level with potential L5 root compression.
>
> The treatment plan was to continue with gentle therapy and give her more time to improve…….. It was difficult to say when she would be able to resume working but certainly it would be a number of months before it would be possible.
>
> The accident will not have been responsible for all the degenerative changes seen on the CT Scan. It showed ligamentum flavum hypertrophy which would be a long-standing problem. However, superimposed upon that was central disc herniation which likely will have been caused acutely by the accident. Certainly prior to the accident she was asymptomatic and never had back problems before."

We note, with deference to [Appellant's neurologist], that the CT Scan report only speaks of the 'disc protrusion' rather than herniation.

A narrative report from [Appellant's doctor] of July 23rd reflects the views expressed by [Appellant's neurologist], emphasizing that the Appellant had no back problems before her accident.

MPIC then, on November 25, 1996, referred [the Appellant] for an independent medical assessment to [independent doctor], who saw her on January 8, 1997. In a report to MPIC of that date, [independent doctor], noting some discrepancy between [the Appellant's] straight-leg raising ability when lying down and that ability in any other position, diagnosed a mild stenosis at L4-5. He was of the view that this was secondary, due to a mild amount of pre-existing congenital stenosis super-imposed by a small bulging disc and thickened ligaments. His report adds, in part:

> "This lady's major functional deficits seem to be coming from her low back pain. It appears that this limits her from doing any strenuous activity that requires forward bending or any pulling or pushing with her back.
>
> This lady has some mild stenosis……. I do not think (it) is of any great consequence. I think this lady suffers more from an idiopathic back pain of the lower spine. It appears to be mechanical in nature and probably comes from some structure that has been irritated by this traumatic event.

> ….The abnormalities of bony origin and ligamentous origin were likely not caused by this accident…….. bulging discs are a very common entity on CT Scan, especially as patients get older. A bulging disc is not specifically caused by any motor vehicle accident or other traumatic event, and may simply exist with no symptoms whatsoever. The presence of it and its relation to the motor vehicle accident cannot be stated, and it may very well have pre-existed this MVA. I think the findings on the CT Scan probably preceded the accident. In addition, I do not know that this lady's symptoms could be accounted for simply by her spinal stenosis.
>
> …..If this bulge was truly a problem, she should have demonstrated on physical examination objective signs. She did not show any decreased reflexes or power changes in her lower extremities. She had a discrepancy in her straight-leg raise testing. Putting everything together, I think there is no indication for a surgical procedure in this lady.
>
> I have recommended that exercises are a very good option ….. I have reassured her that this is not a severe problem, and with time, one should expect her to improve.

On January 28, 1997, [the Appellant's] case manager, having spoken with the Appellant's employer, learned that although [text deleted] had kept [the Appellant's] position open for her for a full year, it was about to terminate her employment permanently. That decision was confirmed by letter of January 31, 1997. [Text deleted] had no part-time nor light duties available and was not prepared to take the Appellant back without a doctor's certificate reflecting 100% good health.

There are two significant reports on file from [text deleted], a physiotherapist to whom [the Appellant] had been referred. The first of those reports, dated April 21, 1997, contains an assessment of mechanical back pain which [Appellant's physiotherapist] believed to be discogenic in nature. He felt that she was "probably classified to work light duties and 50% of a medium job classification as she can lift twenty five pounds frequently." There were no neurological findings. [The Appellant] had "improved in function and in strength, however, keeps herself just short of obtaining the results necessary for her to return to work. She does describe severe pain, even though her function level in the gym would tend to suggest that she is pain focused." In raising the question of [Appellant's doctor's] prognosis, [Appellant's

physiotherapist] added that the Appellant appeared to believe that she may not recover from her accident and return to work.

[Appellant's physiotherapist's] second report, of June 18, 1997 analyses the Appellant's job description from [text deleted] and may be summarized this way:

- [the Appellant] would not be able to dust and vacuum anything above her head or shoulder height;
- She should be able to clean and disinfect bathroom and empty wastebaskets;
- She should have little difficulty in cleaning tables following meetings/conferences and to wash and wax floors, provided there were no discogenic component of pain present;
- Most tasks requiring activity below waist level should cause her no difficulty provided she could avoid upright posture or prolonged walking;
- Washing windows and blinds and adjusting draperies would be difficult for her and would aggravate her condition.

[Appellant's physiotherapist] opined that [the Appellant] could probably assume about 75% of her duties although, he felt, she would likely demonstrate fatigue if those duties were to persist longer than two to four hours per day. There did not appear to be any mechanical treatment that would alleviate her symptoms, as those were structural.

It has to be said that the suggestion that [the Appellant] could assume about 75% of her duties is potentially misleading since the missing 25% will, in a great number of occupations, totally preclude the patient from returning to the same workplace. This, indeed, seems to have been the case for [the Appellant], particularly since there were no light duties nor any part-time duties available for her at [text deleted].

[The Appellant's] case manager at MPIC then appears to have discussed her case with [text deleted], the medical director of MPIC's Claims Services Department. [MPIC's doctor #1] appears to have expressed the view that [the Appellant] had not yet reached pre-accident status

but had reached maximum medical improvement. She might never reach 100% pre-accident status and, says the note on file, “we own this one”.

On August 29, 1997 MPIC referred [the Appellant] to [vocational rehab consulting company], with a request that they perform a vocational assessment and a job search. The rehabilitation consultant in charge of [the Appellant’s] case was [Appellant’s rehab consultant]. After a meeting attended by [Appellant’s rehab consultant], [Appellant’s physiotherapist], [text deleted] (MPIC’s case manager) and the Appellant, several work options for the Appellant were considered, including photographic touch-up work that could be done at [the Appellant’s] home for [text deleted], the operation of a film cartridge machine at [text deleted] at which [the Appellant] could sit or stand as she wished, and working at a parking booth with similar choices. An approach by [Appellant’s rehab consultant] to [text deleted] produced no response and, in any event, [the Appellant] appeared very reluctant to consider that particular location, which required a fairly lengthy bus ride from her home. She raised the same concern with respect to the film processing occupation.

On December 2, 1997, [Appellant’s MPIC case manager #1] referred [the Appellant’s] file to the manager of MPIC’s Rehabilitative Case Management Centre for the completion of a two-year determination in accordance with Section 107 of the Act, which reads as follows:

> **New determination after second anniversary of accident**
>
> **107** From the second anniversary date of an accident, the Corporation may determine an employment for a victim of the accident who is able to work but is unable because of the accident to hold the employment referred to in Section 81 (full time or additional employment) or Section 82 ( more remunerative employment), or determined under Section 106.

Section 109 of the Act requires the Corporation, when making a two-year determination, to consider the education, training, work experience, physical and intellectual abilities of the victim

at the time of that assessment, along with any knowledge or skills that the victim may have acquired in a rehabilitation program approved under the Act.

[Appellant's rehab consultant] furnished a letter to MPIC on December 18, 1997, wherein she provided a sampling of occupations that, in her view, had educational and physical requirements akin to those of which [the Appellant] seemed capable. They included:

- Parkade attendant
- Photofinishing
- Gas Bar attendant
- Light assembly/production
- Cashier
- Bindery machine operation
- Sewing machine operator
- Food service counter attendant/food preparer

In a handwritten letter of the same date, [Appellant's rehab consultant] indicated that she had arranged for a job placement for [the Appellant] to start December 18, 1997, wherein [the Appellant] would be working for [text deleted] as a production/assembly worker. She would work for two hours per day during the first week, three hours during the second and four during the third week; her salary would be paid by MPIC and she would not be involved in extensive or heavy lifting activities. That work placement was intended to be for eight weeks, but [the Appellant] apparently presented so badly and spent so much time talking about her pain and disability throughout the meeting with the employer, that the employer would only agree to take to her on for a three week trial. He wanted to assess her motivation before agreeing to any further time. [Appellant's rehab consultant] therefore recommended that [the Appellant] be offered some pain management counseling to accompany the work experience placement. Throughout this period, [the Appellant] appeared convinced that she would never be able to work again. Unfortunately, she seems to have been supported in that belief by [Appellant's

doctor] who was of the view that she was unfit for vocational rehabilitation and unfit to do any work.

A further meeting was held at the Appellant's home on January 22, 1998, attended by [the Appellant], [Appellant's rehab consultant] and another member of the Casualty and Rehabilitation Claims Team, [text deleted]. The purpose of that meeting was to discuss [the Appellant's] work experience at [text deleted]; it quickly became clear that the Appellant did not believe that she could perform the basic duties of that work. [Appellant's rehab consultant] had taken some pains to find a workplace close to the Appellant's home where the employer was understanding and accommodating. [The Appellant] agreed that the work was easy but insisted that she had become worse since starting there. Accordingly, it was decided to discontinue the work experience, to recommence physiotherapy and to seek updated reports from [Appellant's neurologist] and from [text deleted], a neurosurgeon at [hospital] who had examined [the Appellant] in March of 1997.

[Appellant's neurologist], who had last seen the Appellant on September 25, 1997, expressed the view in a report of January 27, 1998, that she still had quite a significant root compression, likely involving the L4-5 and L1 roots on the left and possibly the S1 root on the right as well. He did not think it reasonable to expect [the Appellant] to continue with her pre-injury job as a housekeeper. He had referred her to [Appellant's neurosurgeon] for consideration of surgery but she had not been interested in that; the alternative to surgery would be continued physiotherapy and the avoidance of heavy work. It was the disc herniation said [Appellant's neurologist] that was precluding her return to work.

[Appellant's neurosurgeon] reported on March 9, 1998, that [the Appellant] had a congenitally small lumbar spinal canal associated with a mild disc herniation. That condition could certainly lead to sciatica. He had found little in the way of objective findings. He had discussed operative intervention, which she had refused. He had suggested that they proceed with myelography if she were interested in proceeding; he had not heard from her since that one visit, which had occurred on February 12, 1997. [Appellant's neurosurgeon] added;

> It is difficult for me to comment on whether or not I felt she was totally disabled from performing her pre-accident employment. Certainly, heavy work such as lifting exacerbated her pain…… it is easy to see how one may be totally disabled for several months time….. I cannot comment on whether or not it would be reasonable to expect her to return to her pre-injury job or her current physical limitation.

A further report from [Appellant's rehab consultant] to [MPIC's Casualty and Rehabilitation Claims Team member], dated March 23, 1998, concluded that the physical restrictions outlined by [Appellant's neurologist] meant that [the Appellant's] physical abilities fell within the definition of sedentary work, with the exception that she be allowed to alternate her position as frequently as she desires (ie: alternate sitting, standing and walking). She reiterated some of the occupations that had been listed in her earlier report, noting that these were some of the employment options available for someone such as [the Appellant] but that she was unsure if another work experience placement would be of any benefit. She expressed herself as willing to help [the Appellant] further if requested.

Matters seem to have become stalled at this point until, on February 24, 1999, the Appellant's file at MPIC was taken over by [Appellant's MPIC case manager #2]. [Appellant's MPIC case manager #2] noted that the insurer "appeared to be in the process of doing the two year determination", but that the file had been static for almost a year. [Appellant's MPIC case manager #2] contacted [the Appellant], who told him she was continuing to attend [text deleted] Physiotherapy for an almost daily workout, and that she also walks four miles a day which, she

said, took her between three and four hours as she had to take breaks every ten to fifteen minutes. [Appellant's MPIC case manager #2] arranged for [text deleted] Physiotherapy to perform a further assessment of the Appellant, with a view to having the results forwarded to [Appellant's neurologist], with whom the Appellant had an appointment on April 12, 1999. At the risk of gross simplification, we may attempt to summarize the twenty-four page report from [text deleted] Physiotherapy, resulting from tests performed on March 17 and 18, 1999, as follows:

a) There were a number of inconsistencies in [the Appellant's] performance during her tests, giving cause for concern and indicating a possibility that maximum functional capacity was not being used;

b) The Appellant obviously perceived herself as crippled and often demonstrated overt pain behaviours;

c) The limitations to her functional capabilities were listed as:

    i.) high perceptions of pain;
    ii.) lower extremity weakness, the right being greater that the left, with activities such as lifting from the floor, squatting and crouching;
    iii.) weakness of trunk musculature and paraspinals with activities such as rotation in sitting and standing, forward bending while sitting and standing; and
    iv.) upper extremity weakness during activities such as sustained work above shoulder level and lifting above shoulder level;

d) The job description of the housekeeping work at [text deleted] was analysed and, in the view of the physiotherapist performing the functional capacity tests, [the Appellant] was able to do every facet of that work, other than occasional squatting to clean the kitchenette refrigerator. We have to say that this finding seems to be at odds with the significant deficits already established by this same assessment. The recommendations flowing from that functional capacity evaluation included a return to work on a graduated basis, starting with two hour work days and progressing gradually to an eight hour day over a period of eight to ten weeks. [The Appellant] was assessed as having the physical capacity to tolerate jobs described as sedentary or light. "[The Appellant] should

continue with her strengthening program and needs to focus on strengthening her lower extremities, particularly the right quadricep and ankle as well as trunk stabilization exercises, upper extremity strengthening with free weights, and functional movement patterns."

On April 14th, 1999, [Appellant's neurologist] provided [Appellant's doctor] with an opinion that [the Appellant] "could not return to work at the moment in any type of occupation which involves lifting or bending". In a letter of April 15th addressed to [Appellant's rehab consultant], [Appellant's neurologist], having reviewed the documentation (including the functional capacity evaluation) reiterates his opinion that "this patient has a significant spinal stenosis which precludes physical work which could worsen the back. That would include vacuuming, lifting, pulling, pushing. Investigations are ongoing regarding the question of surgery for the back."

MPIC then referred [the Appellant] back to [independent doctor] for a further independent medical examination. Meanwhile, the appellant's former employer, [text deleted], now agreed that they would allow her to take part in a graduated return-to-work program at MPIC's expense, to assist [the Appellant] in increasing her physical tolerances; no employment was guaranteed upon completion of that program, since there was no job vacancy at the time. [The Appellant] refused to embark upon that program.

[Independent doctor] saw [the Appellant] again on May 31, 1999. He diagnosed a mild degree of spinal stenosis and a "slightly congenital amount of narrowing" of her spinal canal.

> "In regards to physical work, I think this lady probably, realistically, would not be able to do any heavy or moderate labour job. I suspect a light duty, or sedentary job she might be able to do. Unfortunately, she failed about a year ago, although this does not preclude us from attempting another trial, if such a job could be found for her. I think her graduated schedule, however, should be over a more prolonged period of time. She

> might work only two hours at a time, three days a week, and then after two or three weeks progress to two hours daily, and then if she is tolerating this, to slowly increase her hours maybe two hours every three to four weeks…… Whether it will be successful or not is difficult to predict but I do not feel any harm will come of attempting a return-to-work program.
>
> ……I think this lady had her spinal stenosis most probably prior to her accident. In regards to the current symptoms she is having, I think that the lower back pain might be related to a strain she may have had at the time of the accident. In regards to her leg symptoms, I am not completely convinced this is completely secondary to the spinal stenosis. A component of it may be from stenosis and if that is the case she may have had some aggravation of a pre-existing condition."

[Independent doctor] did not feel that any further therapy would be beneficial for [the Appellant], and he noted that a recent CT Scan had shown no significant changes in the condition of the Appellant's spine.

Following receipt of [independent doctor's] most recent report, [MPIC's doctor #2] of MPIC's Medical Services Team expressed the view that the Appellant's accident-related back strain had resolved and she was capable to returning to her pre-accident occupation; if she had problems with returning to work, those problems were not related to her motor vehicle accident. [MPIC's doctor #2] suggested, (contrary to the recommendations of [independent doctor]) a graduated return to work over a period of eight to ten weeks; [text deleted] had offered assistance in that regard although, as noted above, with no guarantee of employment at the end of the program.

A further meeting was held on September 28, 1999, attended by [the Appellant], [Appellant's rehab consultant], [Appellant's physiotherapist], [Appellant's doctor] and [Appellant's MPIC case manager #2]. At that meeting, [the Appellant] insisted that she would not participate in any graduated return to work at [text deleted], even though that program was intended to help restore her functional capabilities rather than actually return her to a full time job at that location. She was of the view that the work at [text deleted] was simply too hard for her, despite the views

expressed by [independent doctor] and [Appellant's physiotherapist]. [Appellant's doctor] apparently acknowledged that the Appellant's spinal stenosis was probably unrelated to the motor vehicle accident but he expressed concern about a 'herniated' disc. [Appellant's MPIC case manager #2] pointed out the views of [MPIC's doctor #1] that the disc had not actually herniated and that the disc protrusion had had ample time and treatment to cause its healing. There was no evidence that it was impinging on any nerve root. [Appellant's physiotherapist] expressed the view that the disc protrusion might well have predated the accident. The Appellant insisted that she preferred the opinions of [Appellant's neurologist] and [Appellant's doctor] to those of [independent doctor] and [MPIC's doctor #2] and of [Appellant's physiotherapist]. She was not prepared to accept the assessment prepared by [text deleted] Physiotherapy as a result of her March 17 and March 18 evaluation and, as a result, she remained convinced that she was quite unable to participate in the graduated return-to-work program at [text deleted].

MPIC decided, some three years and eight months after [the Appellant's] accident, that she had had ample time and therapies to permit full recovery from the effects of that accident, that she should by that time be able to return to her former employment and that any physical or psychological factors preventing that return must have had some cause other than the MVA. MPIC therefore concluded that, by virtue of Section 110(1)(a), [the Appellant] was no longer entitled to further benefits but that, applying Section 110(2)(d), it would continue those benefits for one further year. That decision was communicated to her by letter of October 22, 1999, signed by [Appellant's MPIC case manager #2] who also offered the continuing services of [Appellant's rehab consultant] to assist [the Appellant] with a job search.

[The Appellant] sought an internal review from that decision, which was confirmed by the Internal Review Officer on March 27, 2000. It is from this latter decision that [the Appellant] now appeals.

In the interim, [Appellant's rehab consultant] and [Appellant's MPIC case manager #2] met again with the Appellant at her home, since she had apparently been reluctant to proceed with a job search. She explained this reluctance by saying that she did not feel she should look for work while [Appellant's MPIC case manager #2's] decision was under appeal; she did not, in any event, feel that she could do any job; her elderly mother, suffering from Alzheimer's disease, needed a great deal of personal care over and above the eight hours of care given daily by Homecare Services. After further discussion, [the Appellant] is reported to have agreed to co-operate with a job search but then to have added that she probably would not be able to maintain any job, no matter how light. She was urged to adopt a more positive attitude.

By letter of December 10, 1999, addressed to [Appellant's doctor], [Appellant's neurologist] reported that in an examination of the Appellant on December 1st, he had found a moderately reduced range of motion on flexion and extension of the back, a mild tenderness in the sacroiliac areas bilaterally, straight-leg raising about thirty degrees bilaterally (causing pain of a typical sciatic nature). There was slightly decreased sensation on the dorsum of the right foot and the lateral aspect of the right lower leg, "otherwise she has good strength, sensation, reflexes and plantar responses". [Appellant's neurologist] added:

> In conclusion, this certainly looks like sciatica. Previous CT Scans had shown some spinal stenosis. I am ordering MRI to clarify. She is still not interested in surgery, though that may be an option to be considered.

[Appellant's doctor] then re-examined [the Appellant] on December 16, 1999. He reported that her back movements were limited, extension being ten degrees and flexion fifty degrees. "The leg sign was positive at forty-five degrees on the left and right". She had told [Appellant's doctor] that her standing was limited to ten minutes, walking to fifteen minutes and sitting to thirty minutes; she said she had to change positions constantly and could not do any repetitive lifting. [Appellant's doctor] concluded "she is unfit to do any work due to disc at L4-L5."

[Appellant's rehab consultant] arranged for the Appellant to attend an employment workshop but she had only been able to complete the first week before calling in sick with the flu; she had expressed concern that she might get pneumonia and had been to see [Appellant's doctor], seeking antibiotics.

On April 10th, arrangements were made for the Appellant to acquire six dumbbells and some 5 lb ankle weights for home exercises, at the expense of MPIC.

A report from [Appellant's rehab consultant] under date April 12th, reads, in part, as follows:

> …..[the Appellant] is finishing off her job search workshops with [text deleted]. [The Appellant] reports that she feels her English skills are much worse than she realized and so she is not comfortable applying for alternate employment until she upgrades her English skills. Both the [text deleted] counsellor and myself pointed out that with the jobs she is applying for English skills are not an issue, but [the Appellant] is insistent.

[The Appellant], not surprisingly, was anxious to complete her English as a Second Language course which would make her more marketable for better employment. Meanwhile, at her request, job search services were kept 'on hold'.

Later in April, [Appellant's rehab consultant] spoke with the Appellant who said she would only consider jobs paying at least $12.00 per hour. [Appellant's rehab consultant] makes the point

that she has been unable to find any jobs for someone with [the Appellant's] "education, training, work experience and physical and intellectual abilities" (to quote the language of Section 109 of the MPIC Act) that pay $12.00 per hour.

**DISCUSSION**:

We have no difficulty in finding, on a reasonable balance of probabilities, that [the Appellant's] spinal stenosis pre-dated her accident; her own doctors agree that this was so. It also seems pretty clear that, if the disc protrusion, of which the existence was substantiated by the CT Scan of April 10, 1996, did not have its origin in the motor vehicle accident, the accident probably did exacerbate the earlier condition. [The Appellant] says that, despite a great deal of physiotherapy and medication, she has continued to suffer from lower back pain which dates from her accident, had never surfaced before and has become worse rather than better over the intervening years. Yet [independent doctor] expresses the view that

> …… if this disc bulge was truly a problem, she should have demonstrated on physical examinations objective signs. She did not show any decreased reflexes or power changes in her lower extremities. She had a discrepancy in her straight-leg raise testing.

[Appellant's MPIC case manager #2's] decision letter of October 22, 1999, comments (reflecting the views expressed in [MPIC's doctor #2's] memorandum of September 20th of that year );

> "…..Disc protrusions usually resolve with conservative treatments that incorporate therapeutic interventions and exercise programs similar to that which has (sic) been provided to you.
>
> ……Where there is a difference between straight-leg raising in the supine and sitting positions, then non-organic causes to the individual's pain may be present. The majority of the medical opinion reviewed does not support the diagnosis of bilateral sciatica.
>
> ……The exact cause of the L4-L5 disc protrusion has not been confirmed. It was the opinion of [Appellant's neurologist] and [Appellant's doctor] that the disc abnormality developed as a result of the motor vehicle accident. The medical documentation indicates that the MVA might have contributed to the development of the disc abnormality. The medical information does not objectively establish that the collision was the primary cause of the disc abnormality."

In our respectful view, it is unnecessary for [the Appellant] to establish objectively that the collision was the primary cause of her disc problems; it is sufficient that the collision be a cause, when the result of an accident is to convert a latent weakness into a debilitation.

The evidence in this case gives rise to a series of questions:

- Although disc protrusions usually resolve with proper treatments, was [the Appellant] an exception to the rule? Possibly.

- Was she receiving the proper kinds of 'conservative' therapy to which [MPIC's doctor #2] and [Appellant's MPIC case manager #2] refer? We have no evidence to the contrary.

- Was [the Appellant] simply malingering? We are not able to find with any certainty that she was, or is, purposely doing so, although it is clear that she is very pain-focused, tends to exaggerate her perceived disabilities and has managed to persuade herself, encouraged by [Appellant's doctor], that she can never work again in any capacity.

- Why was the two-year determination contemplated by Section 107 never completed? The answer to this also remains unclear; the process was started in December of 1997 but [the Appellant's] claim file seems to have fallen between the cracks at that juncture. Had an employment been determined for [the Appellant] at that time, then her rights would have been clear: she would have been entitled to continued IRI for a further year, possibly at a rate reduced by the application of Section 115. That said, MPIC can not be faulted in its approach to the Appellant in this latter context. She has, in fact, benefited materially from the Corporation's apparent election to persevere in its attempts to assess her abilities and find work for her, while continuing to pay her full IRI until October 22, 2000.

It might well be said, by referring to [Appellant's rehab consultant's] letter of December 18, 1997, that MPIC had, in fact, made a determination of the kind contemplated by the language of Section 107. Unfortunately, a decision under that Section was never communicated to [the Appellant]; rather, the Corporation elected to concentrate on its efforts to restore the Appellant to a condition in which she could have resumed her old job, had it been available. Believing that goal had been achieved, [Appellant's MPIC case manager #2] sent out his letter of October 22, 1999. This is not a belief shared by this Commission. We find, on a balance of probabilities, that due to injury caused at least in part by her motor vehicle accident, [the Appellant] was rendered substantially unable to perform the essential duties of the employment being performed

by her at the time of her accident. So far as we can tell, only one CT Scan was ever performed for [the Appellant], with the results reflected earlier in these reasons; there is no evidence of a similar nature to indicate any improvement in the condition depicted in that CT Scan. The herniation/protrusion described was, in the unanimous view of the Appellant's care-givers, attributable in whole or in part to her collision.

**DISPOSITION:**

The claim of [the Appellant] is referred back to MPIC for a determination of employment under Section 107. If her gross income from any employment thus determined for her is less than the gross income used to determine her IRI, Section 115 will apply.

If [the Appellant], without valid reason, refuses a new employment or leaves an employment that she could continue to hold, then the provisions of Section 160 of the Act may be invoked by MPIC.

Dated at Winnipeg this 16th day of October, 2000.

**J. F. REEH TAYLOR, Q.C.**

**YVONNE TAVARES**

**LESLIE COX**