Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-109

PANEL:	**Ms. Yvonne Tavares, Chairperson** **Mr. Colon C. Settle, Q.C.** **Mr. F. Les Cox**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Tom Strutt.**
HEARING DATE:	**February 11, 2002**
ISSUE:	**Entitlement to Income Replacement Indemnity ('IRI') Benefits.**
RELEVANT SECTIONS:	**Sections 84(1) and 106(1) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act') and Section 8 of Manitoba Regulation 37/94.**

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

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident on June 19, 1996, when her car was struck on the left rear bumper by a second vehicle while she was changing lanes. She sustained injuries to her neck, upper back, left side of her head and left shoulder.

The day after the motor vehicle accident, she attended upon [text deleted], a chiropractor, who diagnosed her with cervicothoracic spinal whiplash syndrome and soft tissue contusion of the left

shoulder. He indicated that she had less than full function due to symptoms and/or functional deficits and that she was capable of working modified duties. X-rays taken of the left shoulder did not identify any abnormalities.

After seeing the chiropractor, the Appellant continued to feel worse, so she attended [hospital], where she was seen by [Appellant's doctor #1]. [Appellant's doctor #1] diagnosed a mild whiplash injury and left shoulder strain. He prescribed anti-inflammatories, exercises, and recommended physiotherapy.

The Appellant received chiropractic and physiotherapy treatments for her symptoms, which resulted in improvement of her neck complaints, but no change in her left shoulder condition. Dr. [Appellant's chiropractor] noted that the Appellant had a significant functional limitation in the range of motion of her left shoulder and referred her for an orthopedic assessment.

[Text deleted], an orthopedic specialist at the [text deleted] Clinic, saw the Appellant on October 31, 1996. At that time he advised her that there wasn't anything that physiotherapy could do for her that her chiropractor wasn't already doing. However, due to her persistent symptoms involving her left shoulder, [Appellant's orthopedic specialist] referred her to [text deleted], an orthopedic surgeon. [Appellant's orthopedic surgeon #1] saw the Appellant on December 11, 1996, and, in his report of the same date, he noted that:

> She has come to the point now where her neck problems have settled and she is left with a painful shoulder which she is unable to move freely above elbow height. She pas pain at night, pain with activities.
> …

> I think this lady has some mechanical problem in the shoulder for which she is compensating by bringing her arm through a range of motion in a funny and awkward way. There are two routes to go here and she has already been booked for an MRI, so we will await that. However, I think she will need to have a scope to assess this under direct vision. She may indeed have a labrile injury which is causing her to compensate with this funny motion.

The MRI did not identify any structural abnormalities.

The Appellant continued to attend follow-up assessments with. [Appellant's orthopedic surgeon #1] and [Appellant's chiropractor] throughout 1997. In a further report to MPIC, dated September 16, 1997, [Appellant's orthopedic surgeon #1] indicated the following:

> 1. This lady when last seen February 20, 1997 had mild rotator cuff tendinitis.
>
> 2. Based on the history alone they are related to her accident but I can not be any more specific than that.
>
> 3. Because of her ongoing symptoms we have slated her for an arthroscopy, which will be done in mid-November. She will be followed up clinically within the next couple of weeks. At the time or arthroscopy we will either do a minimal acromioplasty to relieve her cuff or deal with any anatomic problems seen.
>
> 4. I do not believe there will be any permanent impairment at this point in time but I can not be definitive.

[Appellant's orthopedic surgeon #1] performed arthroscopic examination of the Appellant's left shoulder on January 5, 1998. No abnormalities were identified. In his report dated January 27, 1998, regarding the Appellant's progress, [Appellant's orthopedic surgeon #1] indicated the following:

> [The Appellant] is reviewed two weeks following left shoulder scope. Her operative note is not here, but best to my recollection she had no absolute mechanical problem in her shoulder. We had probed her labrum and her cuff. Her wounds are healed well now and she needs to work on aggressive physio probably for a number of months to regain fluid range of motion. Her muscular dysfunction

> is such that it will take time to regain this, but there is no mechanical cause to be found.
>
> She was off work January 5 to 10 and then went back for a short shift and was off again January 14 to 18 before going back full time.

At the time of the accident, the Appellant was a homemaker and self-employed as a babysitter. In addition to her [Text deleted] children, she babysat the child of a friend for 15 hours per week. Following the motor vehicle collision, the Appellant discontinued her work as a babysitter. On August 12, 1997, the Appellant commenced employment with [Text deleted] as a retail sales clerk. Following the surgical procedure on her shoulder, the Appellant was off work for approximately two weeks. The Appellant left her employment with [Text deleted] on April 25, 1998, due to her ongoing complaints of pain with her left shoulder.

[Text deleted] (physiotherapist) provided a report dated May 15, 1998 documenting that [the Appellant's] strength and range of motion had slightly increased. Passive range of motion was full but active range of motion was limited in the planes of flexion and abduction. He also documented that [the Appellant] was unable to tolerate closed kinetic chain exercises due to an increase in her pain complaints.

A subsequent report was received from [Appellant's orthopedic surgeon #1] dated June 4, 1998. In this report, he notes the following:

> [The Appellant] is reviewed again with regards to her left shoulder. She has improved anteriorly from where I did a subcutaneous xylocaine injection on her portal with less tenderness. This is interesting because this was just xylocaine and nothing else. Nonetheless, it did help her.

> On exam today, again she has got a lot of hesitation with respect to any pendular motion and I have encouraged her that she has got to work hard to regain full motion as she has serious biomechanical alterations that may be just prolonging her pain as we have not been able to find any anatomic abnormalities. She should stay off work for the time being but can return as tolerated and I have sent a note to physio just to push hard on her active range of motion pattern as well as anterior desensitization.

[Appellant's orthopedic surgeon #1] submitted further reports dated June 22, 1998, and January 15, 1999. In these reports, he documented that [the Appellant's] investigation did not identify any structural abnormalities involving the left shoulder. It was his opinion that [the Appellant's] decreased range of motion and functional limitation was as a result of "underlying regional soft tissue pain", which resulted in a functional weakness and instability. [Appellant's orthopedic surgeon #1] documented that [the Appellant]. was referred to [Appellant's orthopedic surgeon #2] for a second opinion. He further documented that [Appellant's orthopedic surgeon #2] was in agreement with his opinion and that there was no simple solution to [the Appellant's] left shoulder condition.

[Text deleted], family physician, provided a report dated January 18, 1999. She documented that she initially saw [the Appellant] in August 1998 and diagnosed an impingement syndrome. Her examination identified tender, tight muscles around the paracervical and left shoulder regions. She also documented that she referred [the Appellant] to [Appellant's physical medicine specialist #1].

At this point in time, the case manager referred the file to MPIC's Health Care Services department for review. In his Inter-departmental Memorandum dated March 22, 1999, [MPIC's doctor] provided the following opinion with regard to the Appellant's condition:

> The information I obtained from the various documents I reviewed identifies [the Appellant] as having a chronic pain involving her left shoulder. It is my opinion that [the Appellant's] clinical presentation is in keeping with a chronic pain syndrome (i.e. "*an abnormal condition in which pain is no longer a symptom of tissue injury, but in which pain and pain behaviour become primary disease processes*"). A structural cause for [the Appellant's] symptoms has not been identified. Her pain duration and severity far exceeds that one would expect following a mild to moderate contusion involving the shoulder. Her functional limitations stemming from her pain complaints far exceed that [*sic*] one would expect for contusions she sustained. It is my opinion that the primary contusion/strain healed but that [the Appellant's] subjective and behavioural manifestations of her pain persists beyond objective evidence of structural abnormalities involving the left shoulder.
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> …
>
> After reviewing [the Appellant's] work history and the job descriptions of a retail sales position, it is my opinion that the medical conditions arising from the motor vehicle collision did not result in an impairment of physical function that would prevent [the Appellant] from performing retail sales duties or work in the field she had previously been employed in.

Based on the opinion of [MPIC's doctor], the case manager wrote to the Appellant on May 6, 1999, to advise her as follows:

> This letter will advise that based on a review of all the information on file it is our opinion that the medical conditions arising from the motor vehicle collision did not result in an impairment of physical function that would prevent you from performing the duties of your job description of sales associate. It is also our opinion that there is no documentation of a medical condition arising from the collision that requires further therapeutic intervention.
>
> Therefore we are not prepared to consider any income replacement indemnity or further treatment with respect to this motor vehicle accident.

Subsequent to the case manager's decision of May 6, 1999, [the Appellant's] medical file was again referred to MPIC's Health Care Services department for an opinion regarding whether psychological/psychiatric assessment and/or treatment was recommended to treat the chronic pain syndrome identified in [MPIC's doctor's] memorandum of March 22, 1999. [Text deleted], clinical psychologist with the MPIC Medical Services department, reviewed [the Appellant's] file and determined that:

> Based on the available information, no data is present regarding pre-accident or concomitant psychosocial factors associated with [the Appellant's] current experience of chronic pain. No structural cause for her pain has been found, but her ongoing pain experience is well documented. Given the absence of information upon which to base decisions, I believe that it would be indicated to conduct a psychological assessment with [the Appellant] to further investigate her experience of chronic pain, and to obtain an opinion whether psychologically based intervention would be indicated or recommended to assist in rehabilitation. Following receipt of this information, decisions regarding the potential benefit of psychologically based interventions for pain management can be more accurately made.

The Appellant sought an internal review of the case manager's decision of May 6, 1999. Prior to the Internal Review hearing, arrangements were made for an independent psychological examination of [the Appellant] by [text deleted], clinical psychologist.

In his report, dated June 29, 2000, [independent psychologist] concluded that [the Appellant] was experiencing chronic pain as well as chronic pain behaviour. He noted that there were several indications that [the Appellant] had developed a chronic pain syndrome, including the following:

> a) [The Appellant] continues to have significant pain symptoms 4 years post-injury, to the point where she limits her normal daily routine (e.g. preparation of supper).
>
> b) The pain symptoms are greater than expected by her physicians on the basis of medical findings.

c) Pain has not resolved using traditional medical treatments such as physiotherapy and medication.

d) [The Appellant] is currently dependent upon one particular modality of pain relief (chiropractic care), with minimal sense of control or ability to influence the outcome of her pain (e.g. self-help techniques).

e) Her psychological testing is very consistent with a chronic pain syndrome, since it indicates a high degree of somatization, in which psychological factors are felt to be perpetuating physical symptomatology.

f) There is significant "guarding", or protecting of [the Appellant's] left shoulder, where she is aware of consciously holding it in a certain manner at times, and feels that the arm is quite fragile, etc.

2. [The Appellant's] psychological assessment is therefore similar to the opinion of MPI's medical consultant, [MPIC's doctor] of March 22, 1999 that she had developed a chronic pain syndrome. However at that time, he had no documentation that [the Appellant's] pain syndrome was secondary to her MVA. Currently, [the Appellant's] assessment with me was clearly linked to the symptoms from her MVA.

…

5, I therefore feel that psychological factors have played a role in the perpetuation of [the Appellant's] pain. However, these have not developed to the point of a clinical degree of depression, nor are there indications of PTSD, worksite phobias, or other types of anxiety disorders. Indeed, [the Appellant] is still motivated to work with children, and has aspirations of learning sign language, which would entail frequent use of her shoulders bilaterally. Thus, I am not able to state that the psychological factors are severe enough to "entirely or substantially" (to use the term from the MPIC Act) prevent or restrict her from resuming her previous employment. With regards to her babysitting as an example, [the Appellant] reported to me that she had ceased this operation the day following the accident (before the chronic pain behavior syndrome would have fully developed), and had not reported to me that she had considered resuming this occupation. Thus, I am not able to conclude that psychological factors alone will prevent her from ever resuming work as a babysitter. Indeed, [the Appellant's] history as a self-employed babysitter was only of approximately three months duration at the time of her MVA (as per her Application for Compensation benefits to MPI), and it is unknown as to whether [the Appellant] wished to continue this indefinitely. We have no documentation on attempts to resume the babysitting, and I have no documentation from physicians that set permanent restrictions against resuming the babysitting occupation.

> With regards to the second occupation that [the Appellant] had undertaken post-injury, as a retail sales clerk, [the Appellant's] decision to discontinue this appeared to have been a very gradual one. I was not able to identify any specific anxieties, fears, phobias, etc., associated with the decision. It is certainly possible that a psychological component contributed to her perception of pain, which in turn could have contributed to her eventual decision to discontinue this. However, I would not regard the psychological component as rendering her "entirely or substantially" unable to perform these duties. I also note that [the Appellant] is considering occupations that would involve bilateral shoulder movement (e.g. learning sign language), and I could not therefore conclude that she is psychologically prevented from occupations where she would need to be active with her upper body. As a last factor to note, I would not be able to conclude that [the Appellant] is precluded from her previous employment, since I do not feel that she has had the benefit of all possible treatment modalities (e.g. medication for sleep, consideration of the techniques from her two rehabilitation physicians, and more recently hopefully the inclusion of psychological input into treatment).

[Independent psychologist] recommended that [the Appellant's] chronic pain syndrome would benefit from a combination of physical and psychological treatment modalities. He suggested consideration of a multidisciplinary program that would involve a rehabilitation physician (physiatrist), occupational therapist/physiotherapist, and psychologist. [independent psychologist] also felt that [the Appellant] needed to address her ongoing sleep disorder, which he felt was another factor perpetuating the chronic pain.

The Internal Review Officer issued his decision on August 31, 2000. Based upon a thorough review of the medical reports available, the Internal Review Officer confirmed the decision of the case manager with regard to the termination of IRI benefits. The Internal Review Officer noted the following with regard to the termination of IRI benefits:

> While the medical evidence confirms that you do have ongoing symptomatology which is related to the accident, it has not been established that you are entirely or substantially unable to perform the essential duties of the employment that you held at the time of the accident on account of any physical or mental injury arising from

> the motor vehicle accident in question. Therefore, I am dismissing your Application for Review relating the termination of your IRI benefits.

With respect to the issue of treatment, the Internal Review Officer made the following determination:

> With respect to the issue of treatment [independent psychologist] set out a series of three recommendations on pages 11 and 12 of his report. Given the connection made by [independent psychologist] between your chronic pain syndrome and the motor vehicle accident I am making it a term of my decision that the Corporation proceed to implement [independent psychologist's] recommendations in the event that you elect to pursue same.

The Appellant has now appealed the decision of the Internal Review Officer, dated August 31, 2000, to this Commission. The issue which arises on her appeal is her entitlement to Income Replacement Indemnity benefits.

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

Section 84(1) of the Act:

> **Entitlement to I.R.I. after first 180 days**
> **84(1)** For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.

Section 106 of the MPIC Act:

> **Factors for determining an employment**
> **106(1)** Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall

> consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

Section 8 of Manitoba Regulation 37/94:

> **Meaning of unable to hold employment**
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

In advance of the hearing of this matter, additional medical reports were received from the Appellant's caregivers and various specialists with whom she had consulted.

[Appellant's physical medicine specialist #1] in a report dated June 23, 1999 documented that the Appellant's clinical presentation was in keeping with Myofascial Pain Syndrome with trigger points in multiple muscles around the left upper back, and shoulder girdle regions. Specifically he noted that:

> Her persistent shoulder pain relates to myofascial trigger points in the left upper trapezius, left infraspinatus, left latissimus dorsi and subscapularis muscles all of which refer pain to the shoulder and restrict range of motion. She had normal MRI and arthroscopy indicating no underlying perpetuating factor other than the myofascial trigger points. Previous treatment did not eradicate the trigger points or restore full range of motion to the shoulder leading to chronic pain and restricted range of motion.
>
> Her head and neck symptoms are related to myofascial trigger points in the upper trapezius, sternomastoid and splenius capitus muscles all of which refer pain to headache sites. The restricted range of motion of the cervical spine also relates to those same muscles.

It was [Appellant's physical medicine specialist #1's] recommendation that [the Appellant] should be provided a trigger point directed treatment program aimed to eradicate myofascial

trigger points in conjunction with medication to correct her sleep disorder. In [Appellant's physical medicine specialist #1's] September 30, 1998 report, it is documented that [the Appellant] did not want to receive treatments by means of trigger point injection even though she had received acupuncture needling during 15-20 physiotherapy visits. It was [Appellant's physical medicine specialist #1's] opinion that a trigger point directed treatment program would have a high likelihood of providing the Appellant major relief from her chronic pain symptoms.

In [Appellant's neurologist's] October 16, 2000 report, it is noted that the Appellant was assessed for symptoms of headache, dizzy spells and visual disturbance. [Appellant's neurologist's] examination did not identify any neurologic abnormalities. It was [Appellant's neurologist's] opinion that the Appellant's clinical presentation was in keeping with post-traumatic headaches. It was his recommendation that an MRI should be performed of her brain. No abnormalities were noted on the MRI. [Appellant's neurologist] suggested specific medication which could be tried to treat her headaches.

In [Appellant's ear, nose and throat specialist's] March 23, 2001 report, respecting her examination of the Appellant on August 1, 2000, she did not identify any abnormality referrable to the ear, nose and/or throat. [Appellant's ear, nose and throat specialist] was unable to comment with regards to the Appellant's suitability for employment.

In a report dated March 26, 2001, [Appellant's chronic pain specialist] noted the following:

> My most recent examination was not much changed from my initial examination in 2000.

> From a structural standpoint, I am not aware of the cause of her ongoing pain complaints and limited range of motion. From an impairment perspective however, she appears to have significant reduction in functional range of the left shoulder, and in power of the left shoulder.
>
> As to your questions about functional capacity in employment as a babysitter, or as a retail clothing sales clerk, you are asking questions which are outside of my role as a consultant whose role is to deal with her chronic pain. However, I note that despite being unable to provide a structural basis for her complaints, she has a significant functional impairment in range and strength in the left arm and shoulder.

In a report dated April 16, 2001, [Appellant's physical medicine specialist #2] commented as follows:

> Based on the hypothesis that her pain is ligamentous, in origin, you may find her employability may be quite limited. How well she may be able to babysit will depend upon the child or children she has to look after. If it were a small child requiring a good deal of lifting and carrying and assistance with other activities of daily living, I do not believe that her neck or shoulder pain problems could handle it. If the child were much older and only needed to be supervised she may be able to handle the responsibility. As far as doing retail sales activity I think she would have difficulties doing components of the job. Activities with her neck extended or using her left upper limb maybe increase her pain a great deal.

[Appellant's neuro-optharinologist] provided a report dated June 1, 2001, based on her examination of the Appellant on April 24, 2001 for symptoms of headache, visual disturbance and shoulder pain. [Appellant's neuro-optharinologist] identified normal visual acuity, colour vision, visual fields and optic nerves. She did not identify any nystagmus or abnormalities involving the other cranial nerves. Significant myofascial pain was identified throughout the cervical musculature. [Appellant's neuro-optharinologist] could find no evidence of a neurologic problem affecting the Appellant's vision. [Appellant's neuro-optharinologist] did not feel she was qualified to comment on the subject of the Appellant's employability at any job.

[The Appellant's] file was referred to [text deleted], medical consultant of the MPIC Health Care Services Team, for a further review in order to determine whether there was new medical evidence which would lead him to alter his previous opinion rendered with regard to [the Appellant's] occupational capabilities. From the documents reviewed, [MPIC's doctor] made the following conclusions in his Inter-departmental Memorandum dated June 20, 2001:

1. There is no documentation objectively identifying [the Appellant] as developing a physical condition secondary to the June 19, 1996 motor vehicle collision, to the extent that she would unable to perform occupational duties as a babysitter or retail clothing sales clerk.

2. [The Appellant] is documented as having persistent problems involving her left shoulder that results in pain, loss of movement and loss of power in the absence of muscle wasting. The degree of loss of muscle power identified by the health care professionals that assessed [the Appellant] appears to vary. In other words there is insufficient medical evidence identifying a permanent loss of shoulder strength to a certain magnitude.

3. From a neurologic, otolaryngology, and neuro-opthalmologic basis, a medical condition has not been objectively identified that would account for [the Appellant's] symptomatology.

4. The only medical documentation indicating that [the Appellant] is unable to perform her occupational duties was provided by [Appellant's physical medicine specialist #2] and it appears that his opinion pertaining to her functional limitations is based on her history in the absence of objective clinical and/or radiological findings that would support his opinion.

5. [The Appellant] has chronic pain and persistent symptoms that escape diagnostic detection. In the absence of supportive objective medical evidence it is difficult to causally relate her ongoing symptoms to the incident in question.

6. [The Appellant] has been provided various treatment options to help minimize her symptoms and based on the evidence obtained from the documents reviewed, it appears that she has not benefited from the treatments provided to her. It is therefore reasonable to conclude that further therapeutic interventions would not assist [the Appellant] in resolving her persistent symptoms.

7. The medical evidence does not identify [the Appellant] as having a medical condition for which further diagnostic interventions would be viewed as a medical requirement in the management of the condition.

The information obtained from the documents reviewed indicates that [the Appellant] experiences functional limitations as a result of her symptoms, which have escaped diagnostic detection. Attempting to determine [the Appellant's] functional capabilities by way of a formal evaluation would likely be of little benefit since she has varying levels of pain and loss of shoulder range of motion which would make the evaluation very difficult, if not impossible as far as obtaining any meaningful information from the evaluation. It is my opinion that performing a Functional Capacity Evaluation on an individual with chronic pain is of no benefit. Such an evaluation would only be beneficial in an individual who might have functional limitations following a rehabilitation program in the absence of any significant degree of pain.

CONCLUSIONS

After reviewing the information obtained from the documents noted above, it is my opinion that there is insufficient objective medical evidence that would lead me to alter the opinions previously rendered pertaining to [the Appellant's] occupational capabilities. It is also my opinion that a Functional Capacity Evaluation would not provide any further useful information that would be beneficial in the management of [the Appellant's] symptomatology or return to previous occupational activities.

At the hearing of this matter, counsel for the Appellant submitted that since the motor vehicle accident, the Appellant has continued to suffer persistent left shoulder pain and instability, headaches, cervical pain, headaches, dizzy spells and sleeplessness. He connects these ongoing complaints to the motor vehicle accident of June 19, 1996, since there has been no other event in the Appellant’s history which would account for her ongoing symptomatology. He notes the various medical reports which document functional deficits on behalf of the Appellant. These functional deficits, particularly with respect to her left shoulder, prevent her from returning to her previous employment.

Counsel for the Appellant also submits that the chronic pain syndrome which the Appellant developed as a result of the motor vehicle accident has in fact disabled her to a degree that she cannot function in her previous occupational duties. Despite the opinion of [independent psychologist] that the Appellant has employment potential, counsel for the Appellant argues that the chronic pain syndrome has in fact prevented her from returning to work. He notes that the inability of the Appellant to continue with her employment at [Text deleted] beyond April 25, 1998, because of her pain complaints, provides evidence of her incapacity. Despite financial consequences, the Appellant has not returned to work because she simply cannot manage the demands of either a babysitter position or a retail sales clerk job. Her counsel argues that she wants to work and, in fact, would prefer to work, rather than face a lack of financial resources. Despite the motivation to earn a living to support herself and her [Text deleted] children, she simply is not able to manage a return to work.

Accordingly, counsel for the Appellant concludes that the Appellant is entitled to ongoing receipt of Income Replacement Indemnity benefits since her injuries, which are causally connected to the motor vehicle accident of June 19, 1996, prevent her from continuing to hold employment.

Counsel for MPIC refers the Commission to Section 8 of Regulation 37/94 which sets out the meaning for the phrase "unable to hold employment." According to this section, a person is unable to hold employment when a physical or mental injury that was caused by the accident renders an individual entirely or substantially unable to perform the essential duties of the employment that were performed by the individual at the time of the accident or that the individual would have performed but for the accident.

Counsel for MPIC submits that the relatively minor forces that were involved in this motor vehicle accident would not have resulted in significant physical injury to an individual to a degree that would render her unable to perform occupational duties as a babysitter or retail clothing sales clerk. He argues that the medical evidence on the Appellant's file does not provide any objective evidence of structural damage to the left shoulder. He submits that the functional limitations noted in the medical reports are accounted for by the Appellant's self-imposed restrictions. She displays inconsistent results throughout the assessments, active muscle guarding and a loss of movement and loss of power of the left shoulder in the absence of muscle wasting. Without a physiological basis to explain her functional limitation, counsel for MPIC argues that the Appellant's limitations do not stem from a physical cause.

The chronic pain syndrome, as diagnosed by [independent psychologist], provides an explanation for the Appellant's ongoing complaints of pain. However, counsel for MPIC relies on [independent psychologist's] opinion, which [independent psychologist] reiterated in subsequent correspondence, that the psychological disorder does not prevent the Appellant from working, either as a babysitter or as a retail clothing sales clerk. Consequently, counsel for MPIC submits that the Appellant does not meet the criteria for "unable to hold employment" set out in s. 8 of Regulation 37/94, and therefore the decision of the Internal Review Officer, dated August 31, 2000, should be upheld.

After a careful review of all of the evidence, both oral and documentary, we are unable to conclude, on a balance of probabilities, that the injuries sustained by [the Appellant] in the motor

vehicle accident of June 19, 1996, prevented her from holding employment, either as a babysitter or as a retail sales clerk, almost two years later, from April 25, 1998 and thereafter.

Although we find that the Appellant testified in a truthful manner, and we accept that she has continued to suffer with left shoulder pain, headaches, neck pain and various other symptoms since the date of her accident, we are concerned with the lapse of time between the motor vehicle accident and her inability to continue her employment. She was able to function with her symptoms for approximately two years after the motor vehicle accident. Indeed, she commenced employment at [Text deleted] some 14 months after the motor vehicle accident and held that employment for almost nine months prior to quitting. Additionally, although she did not continue with her babysitting duties after the motor vehicle accident, she has been the primary caregiver for her [Text deleted] children throughout this entire time.

There is a lack of medical evidence on the file of a physiological basis for her inability, almost two years after sustaining the motor vehicle accident-related injuries, to suddenly become unable to continue her employment. There is no objective evidence that, at that point in time, her symptoms had either increased or worsened. Additionally, even her continued absence from the workplace and her ongoing physical rehabilitation have not resulted in a return to the workplace. We conclude, therefore, that the physical injuries which she sustained as a result of the motor vehicle accident did not substantially or entirely prevent her from returning to work.

In his report dated October 26, 2000, responding to correspondence from the Appellant's counsel, [independent psychologist] comments that:

> My response to the employability question, from a psychological perspective, was outlined in conclusion #5 of my report, which spans pages 10 and 11. I began by a general comment that I was not able to find her psychological factors severe enough to meet the criteria of "entirely or substantially" preventing from resuming her previous occupations. I then separately discussed the 2 occupations that were relevant: the baby-sitting that [the Appellant] was conducting at the time of the MVA; and the retail sales clerk position that she had attempted following the MVA.
>
> Thus it is possible for a patient to have a psychological condition, and yet still have employment potential. In the case of your client, she has a pain syndrome, but did not have some of the more serious features such as medication dependency (or addiction), or physical manifestations that were observable by a physician (e.g. neither of her specialists in physical medication, [Appellant's physical medicine specialist #1] and [Appellant's physical medicine specialist #2], had made a diagnosis of chronic pain syndrome, yet they would be familiar with it in their practices). This is discussed in Conclusions 3 and 5 of my report (p. 10). In addition, I was not able to find other conditions that can co-occur with a pain syndrome. As examples, in the paragraph that focuses on the retail sales clerk position in my report (p. 11), I was not able to identify specific anxieties, fears, or phobias associated with the decision that [the Appellant] had made to discontinue her employment, which she had described as a gradual decision. I also could not conclude that psychologically she was prevented from occupations working with bilateral shoulder movement itself, since she had looked forward to potentially entering work as a sign language interpreter. (In contrast, examples of psychological factors that would generally restrict employment might be panic attacks, or a phobia related to the worksite; or a vegetative clinical depression; or Post Traumatic Stress Disorder, etc.).
>
> In light of all these factors, I could not conclude that your client's psychological condition was severe enough to "entirely or substantially" restrict her from the essential duties in babysitting or sales work.

No psychological evidence was submitted by the Appellant to counter the reports of [independent psychologist]. The Commission accepts [independent psychologist's] opinion that the chronic pain syndrome from which the Appellant suffers does not prevent her from working, either as a babysitter or as a salesperson.

Despite the arguments of counsel for [the Appellant] and the testimony of the Appellant, for the foregoing reasons we accept the position advanced on behalf of MPIC and must dismiss this appeal.

Dated at Winnipeg this 12th day of July, 2002.

YVONNE TAVARES

COLON C. SETTLE, Q.C.

F. LES COX