Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-123

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms. Yvonne Tavares** **Mr. Colon C. Settle, Q.C.**
APPEARANCES:	**The Appellant, [the Appellant], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.**
HEARING DATES:	**September 11, 2001, November 8, 2001 and December 11, 2001**
ISSUE(S):	**1. Entitlement to I.R.I. during the first 180 days post-accident;** **2. Entitlement to I.R.I. commencing with the 181st day after the accident; and** **3. Entitlement to coverage for ongoing medical expenses and treatment costs.**
RELEVANT SECTIONS:	**Subsections 70(1), 83(1), 83(2), 84(1), 84(3), 106 and 136(1) of The Manitoba Public Insurance Corporation Act (the "MPIC Act") and Sections 6 and 8 of Manitoba Regulation No. 37/94, Sections 1, 2, 5, 6, and 7 of Manitoba Regulation 39/94 and Section 5 of Manitoba Regulation 40/94**

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

Reasons For Decision

The Appellant, [the Appellant], was involved in an accident on July 14, 1994, when he was struck by a car while riding his bicycle through a pedestrian crosswalk. As a result of the accident, the Appellant sustained significant bruising and a severe laceration across his back requiring stitches. He attended upon [Appellant's doctor #1] on August 4, 1994, who diagnosed

him with a lumbar strain, abrasion, and left wrist sprain. [Appellant's doctor #1] prescribed a course of physiotherapy and Naprosyn for [the Appellant's] conditions.

The Appellant apparently next sought medical attention for his injuries, from [Appellant's doctor #2], on September 6, 1994. [Appellant's doctor #2] provided a report to MPIC, dated December 2, 1994, in which he documented his clinical findings noted on the various dates he examined [the Appellant] as follows:

> [On September 6, 1994] Examination of the cervical spine revealed no tender areas over his neck muscles, and he was observed to open his mouth fully without discomfort. In addition, the range of motion of his neck was full in all spheres, without any discomfort. Examination of his lumbosacral spine revealed a huge abrasion with scarring over his lumbosacral spine region. This scar was more extensive to the right of his spine and less extensive to the left of his spine. Upon palpating the scar, the patient complained of pain and increased sensitivity. The range of motion of the patient's lumbosacral spine was full in all spheres and he was noted to be extremely flexible in that upon forward flexion of his lower back he was able to put both palms flat on the floor in front of him. The range of motion of his hips was full in all spheres and he was able to straight leg raise to 90º bilaterally without discomfort. His lower extremities had normal strength, mobility, sensation, and reflexes.
> …
>
> It was felt that the patient had sustained a significant abrasion to his lumbosacral spine region as a result of the accident. He was sent on this date for physiotherapy to aid in his sensations of pain, hyperesthesia, and dysthesias related to the abrasion and scarring. He was also prescribed Amitriptyline 10 mg. at bedtime on this date for any sleep disturbance associated with his injuries.
>
> The patient was next seen in my office at the [text deleted] Clinic on 28 November 1994. At this time, I was in receipt of the physiotherapy report from [rehab clinic #1]. The patient had only attended for initial assessment on October 26th, 1994, and had not scheduled any further follow-up appointments. According to the patient, he felt that the initial session was not helpful and that he would not benefit from it. Examination of the patient on this date revealed him to have no tender areas over his lumbosacral spine musculature and to again have a full unrestricted range of motion of his low back region. On this date his scar was specifically measured, and was noted to be 16 cm. in length, ranging from the right side of his lumbar region across his lumbar vertebrae to the left side. The scarring was much more extensive on the right side of his lumbar region with the width of the scar being from 1-6 cm. To the left of his spine, the scarring was less extensive and had smaller punctuate scars in several regions.

[Appellant's doctor #2] opined that, apart from the scarring, the Appellant, at that time, had no impairment from the accident, and he anticipated no permanent impairment and no sequelae from the effects of the accident, other than the scarring over the lower back region. Further, he thought that the Appellant was presently fit, well and able to be gainfully employed and that he had made a satisfactory recovery from the effects of his accident.

On April 20, 1995, the Appellant presented to [Appellant's chiropractor], for evaluation and treatment of injuries sustained in the accident. In his report dated June 18, 1996, [Appellant's chiropractor] concluded the following:

> Initially this patient was being seen at the [text deleted] Clinic at a rate of approximately 3 times per week, and as his condition improved over time the treatment frequency decreased accordingly. This patient has made great gains in terms of reducing his daily subjective complaints, and increasing dynamic strength and mobility in the injured musculature. However, I feel that this patient has not yet reached full functional recovery from his injury. Further, it is my belief that this patient will never reach 100% functional recovery from these injuries, as he has been left with deep fibrotic changes in the associated musculature as a result of the scarring from these lacerations.
>
> I feel that this patient has now plateaued with regards to his recovery, and that any further chiropractic therapy would be regarded as being supportive in nature. My sense is that the deep scarring in the musculature will continue to aggravate the paraspinal and quadratus lumborum area, and the muscular tightening will always be an issue with this individual. With this in mind it would be reasonable to assume that future care for this individual would be therapeutically necessary. Further to this, I would invite a second opinion concerning this individual from another chiropractic consultant for assessment of his applicability for continued supportive care, or a referral to a pain management specialist.

As a result of concerns regarding [the Appellant], arrangements were made for him to be assessed by a psychologist, [text deleted]. However, [the Appellant] did not attend appointments scheduled for May 10th and June 19th, 1995.

In order to determine whether the Appellant required further chiropractic treatment or a referral to a physiatrist, the Appellant was referred to [independent chiropractor] for an Independent

Chiropractic Examination. In his report dated September 24, 1996, [independent chiropractor] commented as follows:

> This letter is to confirm that [the Appellant] appeared for a chiropractic assessment on the above mentioned date [September 24, 1996]. During the course of taking the history, it became apparent that I could not adequately assess him and subsequently, the consultation was terminated and I did not perform an examination. He indicated in very strong terms that his condition was deteriorating and that he was getting worse since his accident. I did state to him that I would bring to your attention the matter of him possibly seeing a psychologist specializing in chronic pain. This approach, coupled with patient compliance, could possibly prove helpful.

On May 16, 1997, MPIC's case manager wrote to the Appellant to confirm the following:

1. his ongoing entitlement to periodic chiropractic care;
2. that, he had received the maximum impairment benefit for the scarring sustained to his back; and
3. that, since he was classified as a non-earner at the time of his accident, and as there was no medical information to support that he was unable to perform an entry-level occupation, no Income Replacement Indemnity or funding for retraining would be considered.

In response to a request from MPIC for a progress report respecting the Appellant's ongoing chiropractic care, [Appellant's chiropractor] provided a narrative report dated June 5, 1997, in which he made the following recommendations:

1. This patient should be referred directly by your office to a facility concerned with pain management of myofascial origin.
2. Given the amount of care and the varied approaches of care given to this patient, I would assume that further chiropractic care is supportive in nature. The chiropractic care along with associated physiotherapeutic adjunctive such as ultrasound, clinical acupuncture, and interfrential current have been helpful in alleviating and reducing his symptomatic

> stress. I would suggest that a continuance of supportive care be considered with regards to this patient for an additional short period while he is being evaluated.

From the medical information provided to the Commission, it appears that the Appellant next sought medical attention from [Appellant's doctor #3] on September 11, 1998. He attended follow-up treatments with [Appellant's doctor #3] on October 8, 1998, November 23, 1998, January 6, 1999, January 20, 1999, January 26, 1999, and February 24, 1999. In his report to MPIC dated March 8, 1999,

[Appellant's doctor #3] advised as follows:

> [The Appellant] started to attend my office in the hope that I will be able to provide some relief and control of his lower back pain radiating up to his neck.
>
> On the original examination it was found that the patient is extremely sensitive to the slightest touch anywhere on his back. It was impossible to get an objective picture of his range of movement or properly perform his neurological assessment. The patient was preoccupied with the pain in his back which was according to his terms preventing him from any physical activity that would require more than just basic walking or sitting. From the history obtained from the patient, because of the pain, he was not able to engage in any gainfull *[sic]* employment. …
>
> From the limited examination I came to the conclusion that the patient most probably suffered from a severe form of somatoform pain disorder. He was prescribed Amitriptyline 10 mg at bedtime and was urged to start physiotherapy and home exercise program. Unfortunately the responsibility for recommended treatment was not accepted by M.P.I.C. at that time. Therefore during the visit on November 23, 1998 I referred the patient to [Appellant's physical medicine and rehab specialist] from the department of Physical Medicine and Rehabilitation. The situation with examining the patient and coming to a working diagnosis was the same at [Appellant's physical medicine and rehab specialist's] office. The patient was again diagnosed with severe form of somatoform pain disorder and physiotherapy was arranged through [hospital #1].
>
> Unfortunately the progress was very discouraging – what can be expected after a four years old history of somatoform pain disorder – fibromyalgia.
> …

> It is my personal opinion that the soft tissue injury from the accident in July of 1994 was the trigger mechanism for the development of the patient's severe form of somatoform pain disorder. This condition after it was allowed to develop for almost five years is practically incurable. But maybe with proper rehabilitation therapy, analgesic, sleep modification and ongoing psychological support by all the parties involved in his treatment it may be possible to take the edge off his suffering and [the Appellant] will then be able to lead a relatively normal life.

In his report dated December 8, 1998, to [Appellant's doctor #3], [Appellant's physical medicine and rehab specialist] noted the following with respect to his examination of the Appellant:

> Thank you for asking me to see this [text deleted] year old man with excruciating back pain. It is very difficult to obtain his history very well but I do thank you for a copy of [Appellant's doctor #2's] letter from 1994 as a basis for his history. He displays constant talkativeness with tangential thinking and is next to impossible to obtain a proper history and physical examination. He has low back pain radiating up to the interscapular region with neck pain that has been going on for 4 years since his motor vehicle accident of 1994. He is extremely focused on this, that it upset his life and he could not continue in marshal arts. …
>
> Examination was very difficult. He continued talking on and on requiring assistance with removing his sweater. There were scars on the anterior chest from cooking, scars on the left wrist and hand from previous surgeries and scars on his low back. He really did not allow me to touch the area or palpate it well because of excruciating pain and could not demonstrate very good flexion at all. His gait was normal and he could stand on his tip toes and do a squat and straight leg raising was unremarkable.
> …
>
> He has a severe form of somatoform pain disorder. I will probably send him back to therapy. I do not think that we can cure this problem but perhaps take the edge off of it.

In May of 2000, with the assistance of legal counsel, [Appellant's legal counsel], [the Appellant] proceeded to seek an internal review of the decision of the case manager, dated May 16, 1997. His internal review hearing was held on August 31, 2000, with respect to the following issues:

1. [the Appellant's] entitlement to an Income Replacement Indemnity or funding for retraining;

2. [the Appellant's] entitlement to any additional permanent impairment benefits;

3. [the Appellant's] entitlement to coverage for medical expenses relating to

treatment received, or recommended, since May 1997; and

4. the applicability of Section 160 of *The Manitoba Public Insurance Corporation Act* – in particular subsections (c), (d), (e) and (f) – to this case.

In his decision letter dated October 12, 2000, the Internal Review Officer made the following decisions:

REVIEW DECISIONS

My decisions with respect to the issues outlined above are as follows:

1. With respect to IRI during the first 180 days after the accident, there is no doubt that you were a "non-earner" (as defined in the *Act*) at the time of the accident and that you are not entitled to an IRI during the first 180 days unless you can bring yourself within Subsection 85(1)(a) of the *Act*. The material provided to date does not, in my view, establish your entitlement pursuant to this provision and I am, therefore, confirming the decision of the case manager to deny you an IRI for the first 180 days post-accident.

2. With respect to IRI between the 181st day after the accident and the present time (a period of over five years), Section 86 of the *Act* applies. For the reasons set out below, I am not satisfied that you have established your entitlement to an IRI for this time period, and I am, therefore, confirming the decision of the case manager dated May 16, 1997 on this point.

3. For the reasons set out below, I am not convinced that MPI is obligated to fund a program of retraining for you and I am, therefore, confirming the May 16, 1997 decision of the case manager on this point.

4. With respect to further Permanent Impairment benefits, I was referred to Part 1, Division 9, Subdivision 3, Nos. 9, 10, and 11 (Non-Psychotic Mental Disorder) on Page 90 of the first MPI Permanent Impairment Schedule [Manitoba Regulation P215-41/94]. The comparable provisions of the revised Permanent Impairment Schedule [Manitoba Regulation P215-41/2000] would be Division 11: Cognitive Function on Page 71 (copy enclosed).

5. The provisions of the old Schedule to which I was referred all refer to a "neurotic syndrome" of varying degrees of severity. As there is nothing in the material even suggesting a neurosis – accident-related or otherwise – I cannot say with any degree of certainty that you are entitled to a benefit under any of the cited provisions.

> The new Schedule is, however, framed in somewhat different terms – it simply refers to a "psychiatric condition, syndrome or phenomenon" of varying degrees of severity and requiring varying degrees of medical intervention.
>
> As no formal treatment plan has yet been put forward, it is not possible for me to say whether you fall into Class 4 or Class 5 but, given the absence of any suggestion that you will require monthly psychiatric intervention on a permanent basis, if I were deciding the matter based upon the currently available information, I would place you in Class 5 (5%).
>
> For the reasons set out below, however, I am not satisfied that the required causal nexus between the motor vehicle accident in 1994 and the first diagnosis of a "Somatoform Pain Disorder" in 1999 has been established, and I am, therefore, not prepared to direct that you be paid any further Permanent Impairment benefits at this time.

6. The case manager clearly felt that a psychological assessment was warranted as far back as 1995. If you had attended upon [Appellant's psychologist #1] for either of his scheduled appointments, MPI would most certainly have covered the cost of the assessment and the report. While I have some concerns with one of the main conclusions set out in the report (which I will discuss in more detail below), I am satisfied that it was a reasonable expense to incur – if for no other reason than to permit everyone involved to make a more informed assessment of your entitlement to the various benefits being claimed – and I am, therefore, directing that [Appellant's mother] be reimbursed the sum of $790.00. As noted above, the original receipt was provided at the hearing and is now on the claim file.

7. As will quickly become evident from the outline of the facts (set out below), you frequently missed scheduled appointments and regularly failed to follow through with recommended and prescribed treatment regimes. While "non-compliance" was clearly on the minds of the various case managers at various times, you were never formally notified that your failure to comply with Section 160 of the *Act* might adversely impact your entitlement to PIPP benefits. I have, therefore, disregarded these provisions in arriving at my various decisions.

It is from this decision that [the Appellant] now appeals to this Commission.

At the hearing before the Commission, it was determined that the following issues would form the basis of [the Appellant's] appeal:

1. [the Appellant's] entitlement to I.R.I. during the first 180 days post-accident;
2. [the Appellant's] entitlement to I.R.I. commencing with the 181st day after the accident; and
3. Entitlement to coverage for ongoing medical expenses and treatment costs.

Counsel for MPIC and for the Appellant agreed that the issues surrounding entitlement to any additional permanent impairment benefits for the Appellant needed to be adjourned pending additional assessment and treatment of the Appellant's psychological disorder.

1. Entitlement to I.R.I. during the first 180 days

At the time of the accident in July 1994, MPIC determined that [the Appellant] was a non-earner and, accordingly, his entitlement to Income Replacement Indemnity for the first 180 days post-accident was determined pursuant to Section 85(1) of the MPIC Act.

Section 70(1) of the MPIC Act defines a non-earner as:

> **'non-earner'** means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student.

Section 85(1) of the MPIC Act provides as follows:

> **Entitlement to I.R.I. for first 180 days**
> **85(1)** A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:
>
> (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred.

At the internal review, and at the hearing for the Commission, counsel for [the Appellant] advanced the position that the Appellant was an earner at the time of the accident and,

accordingly, entitled to I.R.I. In his decision dated October 12, 2000, the Internal Review Officer concluded as follows regarding [the Appellant's] claim for I.R.I. during the first 180 days:

> **DISCUSSION & RATIONALE FOR DECISIONS**
>
> **(a) I.R.I. during the first 180 days**
>
> You are familiar with the 1996 [text deleted] decision of the Automobile Injury Compensation Appeal Commission ("the Commission") dealing with the application of Subsection 85(1)(a) of the *Act*. [Appellant's legal counsel] argued at the hearing that the test set out by the Commission in that case was far too stringent and urged me to, in effect, disregard it. I am not prepared to do that.
>
> The [text deleted] test is now routinely applied by MPI and has, in fact, been confirmed by the Commission in at least two subsequent decisions ([text deleted] in 1996 and [text deleted] in 1997).
>
> In my view, the information provided for the first time at the hearing – the education certificate, the undated letter from the putative employer, and the income tax print-outs – falls far short of the standard required to establish entitlement to an IRI pursuant to Section 85(1)(a) of the *Act*.
>
> The other information provided by way of correspondence from [Appellant's legal counsel], an interview with the owner, and my various telephone conversations with you has not changed my view of your entitlement based upon Section 85(1)(a).

Counsel for the Appellant submits that the Appellant was in fact employed as a warehouseman at [text deleted] at the time of his accident, and that, but for the accident, he would have continued to be employed, subject to a probationary period.

In support of the Appellant's position, [Appellant's employer], the proprietor of [text deleted], testified at the hearing before the Commission. According to [Appellant's employer], at the time of the motor vehicle accident on July 14, 1994, [the Appellant] was a probationary employee with [text deleted]. [Appellant's employer] testified that he had hired [the Appellant] in late June of 1994 at the request of his mother, [Appellant's mother], a personal friend of his. [Appellant's

employer] further testified that [the Appellant] was hired on a probationary basis and, if he had worked out, he would have been hired permanently to replace [text deleted] when [text deleted] left employment at the warehouse.

Ledgers summarizing the payroll records of [text deleted] for 1993, 1994 and part of 1995 were supplied by the employer to the Commission. According to the payroll records, [text deleted] commenced full-time employment on or about February 28, 1993, and Mr. P. left full-time employment on or about April 15, 1993. After that, [text deleted] worked essentially on his own, except for brief periods when casual labour was hired to assist in the warehouse. According to the pay cheque stubs, [text deleted] assisted in this capacity in the Fall of 1993, as did [text deleted] for approximately one week in the Spring of 1994.

The payroll records further reflect that on or about June 23, 1994, [Appellant's mother] or [the Appellant] was hired for a period of three weeks approximately, between June 23 and July 14, 1994. On or about July 27, 1994, [text deleted] hired [text deleted], who was employed from July 27 to August 26, 1994, as a casual labourer and was paid on that basis.

[Appellant's employer] testified that [text deleted] was hired to replace [the Appellant] and worked until he went on Workers Compensation leave on or about August 26, 1994. Thereafter, no one was hired by [text deleted] to replace [text deleted]. [Text deleted] worked alone until on or about May 12, 1995, when [text deleted] replaced him. [Text deleted] worked alone between May 15, 1995, to December 31, 1995, except for a period of three weeks between September 21, 1995 and October 15, 1995 when [text deleted] was called back to work.

A copy of [Appellant's employer's] letter dated June 4, 2001, together with copies of two pay

cheques were also tendered as evidence before the Commission. In the letter dated June 4, 2001, [Appellant's employer] states the following:

> From our records [the Appellant] was hired the last week of June 1994.
>
> He was to work full time as a warehouse laborer after training with [text deleted] who would be leaving in the fall.
>
> As with all new employees he was given a chance to show us his work ethic. He was doing his job well during his training process.
>
> He worked until his accident July 14th, then was unable to return.
>
> He was receiving $6.00 per hour paid on a casual basis until fall or until otherwise decided. He would have been kept on I believe if he had not got hurt; we needed an employee and he was doing his job.
>
> He received two pay cheques, cheque [text deleted] made out to his mother at his request and cheque [text deleted] made out to him for July 15/94.

On the basis of the documentary evidence presented and the oral testimony of [Appellant's employer], counsel for the Appellant submitted that [the Appellant] was indeed employed at the time of his accident and therefore entitled to Income Replacement Indemnity benefits.

It was MPIC's position that [the Appellant] was a non-earner during the first 180 days after his accident. In support of their position, they referred to the Application for Compensation completed by [the Appellant], dated July 25, 1994. The Application for Compensation indicates that at the time of the accident, [the Appellant] was on social assistance. Under Part 4 of the Application, [the Appellant] indicated that he was not working at the time of the accident and that an employer had not promised him a job. Under Part 6, he did not indicate any job at the time of the accident. Under Part 7, in regards to his work history, his only reference was to his employment at [text deleted] from 1989 to 1990. There is no evidence on the Application for Compensation, which was completed 11 days after the accident, which indicated that [the

Appellant] was employed as a probationary employee with [text deleted].

[Text deleted] was called to testify at the hearing by MPIC. [Text deleted] worked on a full-time basis at [text deleted], in the warehouse as a shipper/receiver from February 1993 until May 1995. He was responsible for filling orders and shipping orders to customers. According to his testimony, [text deleted] had never met [the Appellant] and did not recall [the Appellant] ever having worked at [text deleted].

In addition, MPIC referred to the medical records from the [hospital #2]. [The Appellant] had attended the [hospital #2] for treatment on the date of the accident, July 14, 1994. According to the records of the [hospital #2], [the Appellant] was unemployed and on welfare.

In a memo to the file dated September 29, 2000, [text deleted], the Internal Review Officer, noted the particulars of his telephone discussions with [text deleted] on that date. According to his notes, [the Appellant] advised him that the job at [text deleted], "*was not even a job (in the sense that he was not being paid) but an opportunity to learn some skills that might have allowed him to make some good money down the road*."

[Internal Review Officer] had also written to [text deleted], the lawyer for [the Appellant], on September 12, 2000, requesting tax information from [Appellant's legal counsel] in respect of [the Appellant] for a number of years. [Appellant's legal counsel] indicated in his reply letter to [Internal Review Officer] dated September 18, 2000, that [the Appellant] went to school in 1992, 1993 and 1994, having graduated from Grade 12 a mere two weeks before his accident. An examination of [the Appellant's] tax return for the year 1994 reveals that [the Appellant] did not receive any T4 earnings during that year and was on social assistance at that time.

Having regard to the statements made by [the Appellant] on his Application for Compensation, in his report to officials at the [hospital #2], and his comments to [text deleted], the Internal Review Officer, the Commission finds that [the Appellant] did not view his employment as a permanent full-time position. Additionally, the documentary evidence (including the payroll records and the pay stubs) presented to the Commission does not support the contention that [the Appellant] would have been employed on a permanent basis. The only sustained period of time when there were two people working in the warehouse was between June 23, 1994, and August 26, 1994, a period of approximately 9 weeks. The critical evidence is that after [text deleted] left, no one replaced [text deleted]. This substantiates that [the Appellant] was only to work on a casual, time limited basis.

We conclude, based on the totality of the evidence before us that:

1. [the Appellant] was employed with [text deleted] from approximately June 23, 1994, to July 14, 1994;
2. [text deleted] was hired to replace [the Appellant] at [text deleted] and he worked from July 17, 1994 until August 26, 1994; and
3. no one was hired to replace [text deleted] after August 26, 1994.

Consequently, we find that [the Appellant] was a temporary earner within the meaning of the MPIC Act and regulations.

Section 70(1) of the MPIC Act defines a temporary earner as:

> **'temporary earner'** means a victim who, at the time of the accident, holds a regular employment on a temporary basis, but does not include a minor or a student.

Section 6 of Manitoba Regulation 37/94 provides as follows:

> **Meaning of temporary employment**
> 6 A person holds a regular employment on a temporary basis where the person
>
> (a) has held the employment for less than one year before the day of the accident;
>
> (b) during the course of the employment, has been employed for not less than 28 hours per week, not including overtime hours; and
>
> (c) is not covered by clause 4(b).

Entitlement to I.R.I. for a temporary earner is governed by Section 83(1) of the MPIC Act, which provides as follows:

> **Entitlement to I.R.I. for first 180 days**
> **83(1)** A temporary earner or part-time earner is entitled to an income replacement indemnity for any time, during the first 180 days after an accident, that the following occurs as a result of the accident:
>
> (a) he or she is unable to continue the employment or to hold an employment that he or she would have held during that period if the accident had not occurred;

Section 83(2) provides the basis for determining an I.R.I. for a temporary earner as follows:

> **Basis for determining I.R.I. for temporary earner or part-time earner**
> **83(2)** The corporation shall determine the income replacement indemnity for a temporary earner or part-time earner on the following basis:
>
> (a) under clause (1)(a), if at the time of the accident
>
> (i) the temporary earner or part-time earner holds or would have held employment as a salaried worker, the gross income that he or she earned or would have earned from the employment.

Accordingly, the Commission finds that, had [the Appellant] not been involved in the accident of July 14, 1994, on the balance of probabilities, he would have continued his employment as casual labour with [text deleted] from July 14, 1994, until August 26, 1994. His entitlement to

I.R.I. for that period of time can best be determined by regard to the number of hours worked by [text deleted], his replacement, for that same period. According to our calculations, [the Appellant's] I.R.I. for the first 180 days after his accident shall be based upon 160.5 hours calculated at $6 per hour, or a gross income of $963.00.

2. Entitlement to I.R.I. after the first 180 days

In his decision dated October 12, 2000, the Internal Review Officer held that there was no entitlement to I.R.I. after the first 180 days for the Appellant, having concluded the following:

> An entitlement to IRI pursuant to Section 86 of the *Act* requires evidence which establishes, on a reasonably strong balance of probabilities, that the claimant suffers from a disabling condition which is causally linked to a motor vehicle accident that occurred on or after March 1, 1994, and which prevents the claimant from engaging in the type of employment determined for him pursuant to Sections 86 and 106 of the Act.
>
> By the time the 181st day arrived, the file contained an opinion from the only doctor familiar with your pre-accident medical condition that you were "fit, well, and able to be gainfully employed." There was absolutely no contrary evidence at the time, and it is hardly a surprise that the case manager did not feel it necessary to proceed with a formal 180-day determination. There was simply nothing at the time to suggest any entitlement to IRI and the file had, indeed, been dormant for several months as you were not attending for your recommended physiotherapy treatments and had not yet started with your chiropractic treatment.
>
> When [Appellant's chiropractor] was specifically asked about your work capabilities in 1996, he indicated to the case manager that he did not feel qualified to say that you were totally disabled from any occupation. In fact, he felt that you were employable – just not as a heavy labourer. As noted above, however, the only evidence of pre-accident employment available to the case manager at that time was that you had last worked as a sales clerk some five years before the accident. I found it somewhat curious that someone who described himself as being in top physical condition prior to the accident had no significant work history in the five years prior to the accident – not even "heavy labour" type of employment (which, typically, does not require a great deal of formal education). If there is an explanation for your absence from the workforce between the ages of [text deleted] and [text deleted] (apart from the time he spent working on his Grade XII equivalency), it does not appear on the file and was not given to me at the hearing.
>
> The May 16, 1997, decision letter indicates that you had been determined into an entry level employment similar to your pre-accident employment (i.e. as a sales clerk) and states, rightly so at the time, that there was no evidence of an inability

> to perform that type of work. I might add that there is still precious little in the way of evidence of such an inability.
>
> Several practitioners have asserted that you suffer from a "Somatoform Pain Disorder", and have opined that it was caused by the motor vehicle accident in 1994. No one, however, has stated that you are incapable of an entry level occupation which does not involve heavy labour. In the absence of such an opinion, an entitlement to an IRI pursuant to Section 86 has not been established.

Counsel for the Appellant submits that, contrary to the decision of the Internal Review Officer, the Appellant was not capable of working at any type of employment after the first 180 days post-accident, due to the Somatoform Pain Disorder from which he suffers, which is causally related to the accident of July 14, 1994. Accordingly, he submits that [text deleted] is entitled to receipt of I.R.I. from the 181st day after the accident and thereafter.

In August 2000, [the Appellant] was self-referred, at the suggestion of his lawyer, [Appellant's legal counsel], to [Appellant's psychologist #2], a clinical psychologist, in hopes of clarifying the nature of his current difficulties. In particular, the assessment was to evaluate [the Appellant's] current quality of psychological functioning and comment upon any relationship, should one exist, between [the Appellant's] reported chronic physical pain and the motor vehicle accident of July 14, 1994. The assessment was completed by [Appellant's psychologist #3], a psychologist candidate, supervised by [Appellant's psychologist #2]. This assessment involved a clinical interview, intelligence and personality assessment.

In his report dated August 28, 2000, [Appellant's psychologist #3] had the following summary and recommendations based on his assessment of the Appellant:

> Evaluation results indicate that [the Appellant] is suffering from a Somotoform [*sic*] Pain Disorder which had its onset shortly after his motor vehicle accident in 1994. A Somatoform Pain Disorder is a disorder wherein pain has (at least much of) its origin in psychological functioning. It appears that the accident and its elements left [the Appellant] psychologically overwhelmed and that he has experienced his unbearable psychological distress as physical pain. As is the case

> with such a disorder, [the Appellant] is unconscious that he has physicalised his psychological pain.
>
> Medical reports available to the present evaluation are that there is no identifiable organic cause for [the Appellant's] pain. Physicians searching for a general medical explanation for [the Appellant's] ongoing pain understandably found none, and no consideration was apparently given to the possibility of a clinical psychological or psychiatric diagnosis related to the accident. This has left [the Appellant] feeling greatly misunderstood and understandably distressed, as he does indeed appear to experience significant pain. We consider the lack of psychological or psychiatric support to date to have been unhelpful.
>
> In other words, it seems quite possible that [the Appellant] actually has suffered little or no permanent physical disability from the 1994 accident. This said, he certainly appears to have sustained a disabling psychological injury from the accident and of course a psychological problem may be as crippling as a physical injury. Psychologically-speaking, [the Appellant] remains fragile, unable to develop insight into his problems, and in particular, into the possibility that his main injury in the motor vehicle accident of July, 1994, was not physical.

Drs. [Appellant's psychologist #2]] and [Appellant's psychologist #3] provided a follow-up report on March 23, 2001, to counsel for the Appellant. In this report, they provided additional information related to their recent psychological assessment of [the Appellant] and in particular elaborated on the DSM-IV multiaxial diagnoses. In addressing the issue of diagnosis, they commented as follows:

> Our findings are summarized in our narrative report of August 28, 2000. We considered there to be indications that [the Appellant] had suffered a significant psychological injury related to a motor vehicle accident in July, 1994. Moreover, we described what we saw as enduring premorbid patterns of perceiving, relating to, and thinking about the environment and himself that were inflexible and maladaptive. As well, we referred to [the Appellant's] poor capacity for psychological insight, the relatively low quality of his interpersonal relating, and in this way descriptively alluded to an Axis II (personality disorder) diagnosis in terms of standard psychological or psychiatric multiaxial diagnosis.
>
> We did not provide a detailed, multiaxial written diagnosis in our report of August 28, 2000, because he was self-referred and we were providing feedback and the report to [the Appellant]. As such, we were providing the report to someone who did not have sufficient psychological background, never mind the psychological insight, to understand or to deal with this personal and quite complex, technical information. Report writing is most ethically aimed at the audience which will receive it.

> Following is our opinion regarding [the Appellant's] diagnosis in full multiaxial format.
>
> Axis I: Pain Disorder Associated With Psychological Factors
> Rule-out: Depressive Disorder NOS
> Rule-out: Anxiety Disorder NOS
> Axis II: 301.9 Personality Disorder NOS with Cluster C and passive/aggressive traits
> Axis III: Scarring related to MVA, 1992
> Axis IV: Financial difficulties. Legal stresses related to Autopac Claim, unemployment
> GAF: 45 (current)
>
> It makes sense to conceptualize his situation as one wherein a difficult event (the motor vehicle accident and [the Appellant's] injuries) were seeds which found fertile ground in [the Appellant's] personality, and appear to have grown into something devastating for him. Obviously many people have suffered injuries similar to, or quite a bit more serious than, those of [the Appellant], and have not developed a Somatoform Pain Disorder. Leaving aside the issue of an as-yet undetermined general medical cause for his pain, it does seem as though psychological factors have a very important role in the onset, severity, and maintenance of his pain.

[Appellant's psychologist #2] and [Appellant's psychologist #3] were also asked to comment on the causal connection between [the Appellant's] psychological condition and the motor vehicle accident of July 1994. In their report they provide the following analysis:

> Next, we are of course unable to say that there is a clear cause and effect relationship between the motor vehicle accident in question and [the Appellant's] pain disorder, but we can say that there appears to be a concomitant relationship. Given what we know about [the Appellant], it appears possible that his psychological injury is related to the MVA in 1992 [*sic*], and given all of the evidence available to us, it seems probable that there is a relationship. Of particular note is [the Appellant's] description of his time in the Emergency Department of the hospital following his accident. As we note in our report, his experience of these events appear entirely out of proportion with external reality: his physical injuries were perceived by him as massive and horrific. His account of his emergency room experience is remarkable for its drama, given the more mundane facts as presented in hospital charts.

At the request of MPIC, [the Appellant] underwent an additional psychological assessment by [text deleted], a registered clinical psychologist, on July 23 and 30, 2001. Based on [the

Appellant's] history and presentation, [MPIC's psychologist] suggested the following diagnosis:

> Axis I: Pain Disorder Associated With Psychological Factors, Chronic
> Axis II: Personality Disorder NOS with - Cluster B traits
> Axis III: Scarring related to MVA
> Axis IV: Financial problems, Occupational problems
> Axis V: Current GAF - 45

In his report dated August 8, 2001, [MPIC's psychologist] compares his diagnosis with that of the previous assessment conducted by. [Appellant's psychologist #3]/[Appellant's psychologist #2]. He concurs with [Appellant's psychologist #3]/[Appellant's psychologist #2] that [the Appellant] does meet the full DSM-IV criteria for having a Chronic Pain Disorder associated with Psychological Features. He notes that [the Appellant] does not appear to have a mood, anxiety or psychotic disorder which would better account for his symptoms at that time. However, [MPIC's psychologist] differs in his assessment from [Appellant's psychologist #3]/[Appellant's psychologist #2] with regard to the personality profile of [the Appellant]. In his report dated August 8, 2001 he comments that:

> It is my opinion that [the Appellant] does not appear to demonstrate cluster C traits, but more clearly has a cluster B personality disorder. Individuals with cluster C traits tend to be passive, dependent, anxious, fearful and rarely speak their mind. Based on the file review, his presentation during the interviews and the results of the PAI, this is clearly not the case with [the Appellant]. Furthermore, as noted earlier, [Appellant's psychologist #3]/[Appellant's psychologist #2] do indicate that [the Appellant] had difficulties managing anger and oppositional tendencies which are more characteristic of individuals with Cluster B traits. In particular, he demonstrates histrionic and narcissistic traits as was evident by his excessively impressionistic style of speech and a grandiose sense of self importance and entitlement during the interviews and as documented in the file.

In the referral letter to [MPIC's psychologist] from MPIC, his opinion was also sought at to whether or not the psychological condition that [the Appellant] was experiencing was (a) permanent and (b) attributable to the motor vehicle accident. He commented as follows:

> Based on the assessment, the answers would appear to be "unknown" and

> "likely". It is very hard to say that his condition is permanent for the simple fact that he has had no psychological treatment for it. Once he has had treatment (which will be discussed shortly) then the individuals treating him will be in a better position to address this question. It is likely that his condition is attributable to the MVA as he stated that he was generally healthy prior to this event. No other medical evidence suggests otherwise. His condition of course, is also partly attributable to his personality style in that individuals with this style who experience such an event are more inclined to develop a Pain Disorder than someone who experiences the same event without the personality overlay.

With respect to the issue of the Appellant's employability, [MPIC's psychologist] noted that:

> While he may not be able to do heavy labour, it is likely from his current presentation that he is capable of some kind of work. It is not clear what that work will involve, however, given that he's never really had a job of any significant duration.

In September 2001, MPIC carried out a formal 180-day determination of employment for the Appellant in accordance with the Act and Regulations. Based upon [the Appellant.'s] work history, education level, and the employment he held in the 5 years immediately preceding the motor vehicle accident, [the Appellant] was determined as a file clerk with an annual salary of minimum wage. MPIC's Healthcare Services Team then reviewed the determined employment in order to evaluate [the Appellant's] capability to perform such an occupation in light of all of the medical evidence on file. In his Inter-Departmental Memorandum dated October 11, 2001, [text deleted], Medical Director of MPIC's Health Care Services team concluded as follows:

> In my opinion, given the information on file, [the Appellant] is described as having a suspected permanent partial impairment at or around the time of January 1995, some 180 days after the collision in question. This permanent partial impairment would be related to the scarring of his lumbar spine. There may have also been some muscular shortening, with specific mention of the gluteal muscles and the quadratus lumborum. Despite this permanent partial impairment, the patient was described as having excellent strength, no neurologic abnormality and excellent spinal range of motion. He is not described as having any significant partial disability, permanent or otherwise. Therefore, in my opinion, and on the balance of probability, given the information on file, [the Appellant] would have been able to perform the occupation of a file clerk in relationship to the injuries sustained in the collision in question, during the timeframe in question. This is specifically stated by [Appellant's doctor #2], who had seen the patient in the closest temporal proximity to the collision in question, and provided serial

> assessments. [Appellant's chiropractor's] clinical notes also seem to substantiate this opinion.

In preparation for the hearing before the Commission, [MPIC's doctor] was also asked to comment on whether or not [the Appellant] had a chronic pain disorder, and if so, whether it was related to the motor vehicle accident. In his report dated November 2, 2001, [MPIC's doctor] comments as follows:

> 1. In my opinion, the evidence on file does indicate that [the Appellant] has a pain disorder. The diagnostic criteria for pain disorder are the following:
>
>   a) Pain in one or more anatomical sites that is the predominant focus of the clinical presentation in a sufficient severity to warrant clinical attention.
>
>   This is clearly the case in [the Appellant].
>
>   b) The pain causes clinically significant distress where impairment in social, occupational or other important areas of functioning.
>   This also appears to be the case in [the Appellant].
>
>   c) Psychological factors are judged to have an important role in the onset, severity, exacerbation, or maintenance of the pain.
>
>   **Reviewer Comment**
>
>   In my opinion, psychological factors are not responsible for the onset, or severity of the patient's pain. There appears to be more evidence that the patient's psychological factors may have added to the maintenance of his pain.
>
>   d) The symptom or deficit is not intentionally produced or feigned.
>
>   This does not appear to be the case in [the Appellant]. He does not appear to be a malingerer.
>
>   e) The pain is not better accounted for by a mood, anxiety, or psychotic disorder, and does not meet the criteria for dyspareunia.
>
>   [The Appellant's] problem does not appear to be account *[sic]* for by mood, anxiety, or psychotic disorder.
>
>   Therefore [the Appellant] appears to meet the criteria for a pain disorder. He has had it for more than six months, therefore he meets the criteria for a chronic pain disorder. In my opinion, the patient's pain disorder is a

direct consequence of the collision in question.

[MPIC's doctor] was also asked to comment on whether the identified pain disorder would be expected to interfere with [the Appellant's] ability to carry out a job consistent with that of a file clerk or similar employment. [MPIC's doctor] noted the following with regards to [the Appellant's] employability:

> 3. [The Appellant's] occupation has been determined as a file clerk. The information on file, in general indicates that [the Appellant] would have been able to perform such an occupation, in my opinion. [Appellant's doctor #2], [Appellant's chiropractor], and [Appellant's doctor #3] all refer to the patient being able to perform some type of lighter work. This is in spite of the patient's pain disorder. Based on the overall physical description of [the Appellant], the balance of probability would indicate that he would be able to perform the tasks associated with a file clerk from a physical perspective. Based on the psychological description, with an absence of depression, anxiety, or formal thought disorder, it would appear that [the Appellant] would be able to perform the job description of a file clerk. The description of his volunteering and working with martial arts students would also support this conclusion.
>
> With regard to the timing of the identification of significant impairment and disability related to the patient's pain disorder, I would offer the following. Although the patient's psychological state is described as being something that needs to be addressed by [Appellant's chiropractor] on or around May 1995 and by [independent chiropractor] in 1996, there is no clear, consistent, or cogent evidence that the patient had psychological impairment and disability. That evidence is supplied by [Appellant's doctor #3] and would have been dated around September 1999. The diagnosis of a somatoform pain disorder is made by [Appellant's physical medicine and rehab specialist] in December 1998, and the patient's clinical presentation appears to have changed from that as previously documented. Therefore, one could conclude, on the balance of probability, the pain disorder had become a documented impairment as of December 1998. This impairment, based on [Appellant's doctor #3's] notation as well as the notation of [MPIC's psychologist] is not either permanent or complete. All health care practitioners believe that the appropriate treatment for [the Appellant] may lead to some amelioration of his pain disorder. Therefore, it will hopefully not be permanent. Again, most clinicians describe that the patient has a modicum of physical and psychological functioning. They do not imply total disability or total impairment. They imply partial impairment, which in my opinion, wold be consistent with the occupation of a file clerk. Such an occupation would not be expected to be a significant psychological stressor to [the Appellant], nor a significant physical stressor to [the Appellant].

With respect to the issue of employability, [Appellant's psychologist #3] and [Appellant's psychologist #2] provided an additional report dated November 10, 2001, in which they were asked to comment, to the extent able, upon the question of whether [the Appellant] would likely have been capable of working in some occupation by the middle of January 1995, a point 180 days following the motor vehicle accident of July 1994. In their report, they comment as follows:

> It has been established that the onset of the Pain Disorder was some time after the MVA, given that there are no reports that he complained about pain before the MVA and that he has complained ever since of pain related to the injury to his back from the MVA specifically. As for onset, it is usually assumed that a (Psychogenic or Somatoform) Pain Disorder has its onset during the weeks or months following a traumatic event or major psychosocial stressor. There would likely have been some overlap between [the Appellant's] experience of pain related to a general medical condition (that is, pain that most anyone would experience after receiving lacerations to his back) and the emergence of the psychogenic pain disorder. In other words, one would normally expect that a patient's pain would lessen gradually as his or her injuries healed and that the experience of significant pain after the physical injuries were apparently completely healed would be unusual and considered possibly psychogenic. In a report dated December 2, 1994, approximately five months after the MVA, [the Appellant's] physician, [Appellant's doctor #2], reported that [the Appellant's] injuries from the MVA were largely healed and that he was therefore now able to work. [Appellant's doctor #2] did report that [the Appellant] still complained of physical symptoms, as well as flashbacks to the MVA and nightmares. Taking [Appellant's doctor #2's] report and the generally accepted research about the normal onset of a Somatoform Pain Disorder, it seems highly probable that [the Appellant's] Pain Disorder was emerging before the beginning of 1995.
>
> ….
>
> The degree to which [the Appellant] was disabled by January, 1995 can be debated of course, but suffice it to say that, formerly having worked (for example, through adult education), [the Appellant] did not consider himself able to work following the MVA (given that he did not in fact work) and this seems fundamentally important given that there has never been a suggestion that [the Appellant] is malingering. In other words, given his psychological situation as we know it now, and given what is known about the normal nature and course of his difficulties, it seems probable that the fact that he did not work is evidence that he was unable to do so by January, 1995.

A further opinion was sought from [MPIC's psychologist] regarding whether or not [the

Appellant], on a balance of probabilities, was able to perform the essential duties of a file clerk (or similar occupation) as of the 181st day following his MVA in July, 1994. In his report dated November 18, 2001, [MPIC's psychologist] concluded as follows:

> In conclusion, based on the information provided, it is my professional opinion based on a balance of probabilities, that [the Appellant] would have been able to perform the occupation of a file clerk or similar occupation as of the 181st day after the MVA and thereafter. [Appellant's doctor #2] knew [the Appellant] for approximately two years prior to the MVA and provided assessments of him after the MVA. I would assume that after having a patient for two years, a doctor would be able to provide an adequate assessment of that person's physical and psychological functioning. [Appellant's doctor #2] clearly stated when [the Appellant] was disabled and subsequently when he had recovered as much as possible from his accident and was able to return to gainful employment. From my perspective, this is a very clear, concise and reliable opinion. As noted, [Appellant's chiropractor] offered a similar opinion regarding [the Appellant's] employability some months after the 181st day.

Counsel for [the Appellant] submits that the evidence demonstrates that [the Appellant] was injured in a motor vehicle accident on July 14, 1994. The psychological assessment conducted by [Appellant's psychologist #3] and [Appellant's psychologist #2] clearly indicate that [the Appellant] developed a Somatoform Pain Disorder as a result of this accident, and indeed, counsel for the Appellant submits that there is agreement from everyone involved with the file that the motor vehicle accident was the cause of [the Appellant's] chronic pain disorder.

Counsel for [the Appellant] argues that as a result of the chronic pain disorder which the Appellant developed from the motor vehicle accident, [the Appellant] was not employable from the 181st day after the accident onward. He cites [the Appellant's] failed attempts at employment and training during the years after the motor vehicle accident – his position as a doorman in February 1996, which he left due to the increased demands of the position, and his failure in 1997 to complete the [text deleted] Program at [text deleted] because of his inability to get along with other students and staff – as evidence of [the Appellant's] incapacity to maintain a stable,

ongoing commitment that would be required of any employment. He contrasts this with [the Appellant's] situation before the accident, in that he had successfully obtained his Grade 12 diploma at Adult Education and had begun steady employment at [text deleted].

Additionally, counsel for the Appellant argues that the Somatoform Pain Disorder had its onset by the 181st day after the accident. In support of his position, counsel referred to the reports of [Appellant's psychologist #3] and [Appellant's psychologist #2] and [Appellant's psychologist #3's] testimony before the Commission. It was [Appellant's psychologist #3's] opinion that, on a balance of probabilities, the motor vehicle accident was the trigger for the Appellant's pain disorder. In their report of November 10, 2001, [Appellant's psychologist #3] and [Appellant's psychologist #2] had noted that "*As for onset, it is usually assumed that a (Psychogenic or Somatoform) Pain Disorder has its onset during the weeks or months following a traumatic event or major psychosocial stressor*". [Appellant's psychologist #3] testified that the Appellant's physical pain should likely have resolved by December 1994 and this was evidenced by [Appellant's doctor #2's] report. However, he noted that the symptoms that [Appellant's doctor #2] was describing in his report, for example, the flashbacks, were suggestive of psychological issues. Therefore, according to [Appellant's psychologist #3], the pain disorder would likely have had its onset by that time.

Moreover, counsel for the Appellant notes that there was evidence throughout the file of [the Appellant's] psychological issues. He refers us to:

1. The comments of [the Appellant's] case manager in October 1994, to the effect that "*I am certainly not a professional in the psychiatric field but I know enough to recognize a possible manic-depressive or schizophrenic personality. The times that I have spoken with* [the Appellant] *he has been in a manic state*".

2. [Independent chiropractor]'s comment in September 1996 that, "*I did state to him that I would bring to your attention the matter of him possibly seeing a psychologist specializing in chronic pain*".
3. [Appellant's physical medicine and rehab specialist's] diagnosis of the Appellant in December 1998 with a severe form of a Somatoform Pain Disorder.
4. [Appellant's doctor #3's] opinion in March 1999 that the Appellant's soft tissue injury from the accident was the trigger for the development of his severe form of Somatoform Pain Disorder. [Appellant's doctor #3] stated that this had developed over the past five years, and that it would be practically incurable. [Appellant's doctor #3] recommended that the Appellant would require proper rehabilitation, sleep modification and ongoing psychological support by the parties involved in his treatment.

Counsel for the Appellant maintains that these various examples provide an illustration of an individual who was dealing with chronic pain issues commencing shortly after the motor vehicle accident. Accordingly, counsel for the Appellant argues that pursuant to Section 84(1) of the MPIC Act, the Appellant is entitled to an Income Replacement Indemnity from the 181st day after the motor vehicle accident onward.

Counsel for MPIC submits that although [the Appellant] may be suffering from a chronic pain disorder, this did not prevent him from holding employment at an entry-level position, such as a file clerk, from the 181st day after the accident onward. In support of his position, counsel refers to the report of [Appellant's doctor #2] in December 1994, who he suggests was in the best position to determine the Appellant's condition, at the relevant time. According to [Appellant's doctor #2's] report, the Appellant was "*fit, well, and able to be gainfully employed*".

Additionally, counsel for MPIC notes that when [Appellant's chiropractor] was specifically asked about the Appellant's work capabilities in 1996, he indicated to the case manager that he did not feel qualified to say that the Appellant was totally disabled from any occupation. In fact [Appellant's chiropractor] felt that the Appellant was employable - just not as a heavy labourer.

Counsel for MPIC also referred to the reports and testimony of [MPIC's psychologist], in support of his contention that the Appellant was employable. He submits that [MPIC's psychologist's] evidence is preferable to that of [Appellant's psychologist #3], as he has greater experience in the psychological field and he was more correct in his assessment of the Appellant's personality disorder, identifying the Cluster B traits. [MPIC's psychologist] is of the opinion, based on a balance of probabilities, that [the Appellant] would have been able to perform the occupation of a file clerk or similar occupation as of the 181st day after the MVA and thereafter. Similarly, [MPIC's doctor] opines that an occupation such as a file clerk would not be expected to be a significant psychological stressor to [the Appellant], nor a significant physical stressor to [the Appellant].

Counsel for MPIC therefore concludes that, notwithstanding that [the Appellant] may have had a chronic pain disorder or a Somatoform Pain Disorder, this would not have prevented the Appellant from holding the determined employment of a file clerk from the 181st day after the accident onward. Accordingly, counsel submits that there is no entitlement to I.R.I. after the first 180 days, as [the Appellant] was able to hold the determined employment.

Alternatively, counsel for MPIC argued that if the Commission determines that [the Appellant] is currently unable to hold employment, that does not necessarily imply that [the Appellant] was unemployable at the 181st day, in January 1995. He urged the Commission to determine when

[the Appellant's] inability to hold employment commenced and to assess his entitlement to I.R.I. on that basis. In that regard, counsel for MPIC submits that according to the evidence on the file, the pain disorder became a documented impairment as of December 1998, when diagnosed by [Appellant's physical medicine and rehab specialist] and [Appellant's doctor #3]. According to the reports of [Appellant's physical medicine and rehab specialist] and [Appellant's doctor #3], it appears that the Appellant's circumstances became worse in late 1998 - 1999, since the Appellant's condition was markedly different at that time from that reported by [Appellant's doctor #2] in December 1994 and [Appellant's chiropractor] in June 1996.

The evidence clearly establishes that [the Appellant] has a Somatoform Pain Disorder – [Appellant's doctor #3], [Appellant's physical medicine and rehab specialist], [Appellant's psychologist #2] and [Appellant's psychologist #3] and [MPIC's psychologist] are all in agreement as to the Appellant's diagnosis; [MPIC's doctor] acknowledges that the Appellant has a chronic pain disorder (although he does not believe that psychological factors are responsible for the onset, or severity of the Appellant's pain). There also appears to be agreement as to causation – again, all of the experts who have assessed [the Appellant] agree that his current condition is a direct result of the motor vehicle accident of July 1994. The issue which requires determination, therefore, is whether or not the Somatoform Pain Disorder prevented [the Appellant] from holding the determined employment from the 181st day after the accident and thereafter.

Having determined that [the Appellant] was a temporary earner during the first 180 days after the motor vehicle accident, the relevant sections of the MPIC Act applicable to his determination of an entitlement to I.R.I. after the first 180 days are as follows:

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.

Determination of I.R.I.
84(3) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

(a) whether the victim could have held the employment on a full-time or part-time basis;

(b) the work experience and earnings of the victim in the five years before the accident; and

(c) the regulations.

Section 106 of the Act provides as follows:

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 is also applicable. It provides as follows:

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.

An analysis of the medical reports on file is crucial to determining the issue of [the Appellant's] employability. In his December report, [Appellant's doctor #2] specifically stated that [the

Appellant] was totally disabled from any form of work from July 14, 1994, to November 14, 1994. However, apart from the scarring on his back, [Appellant's doctor #2] felt that [the Appellant] had no other impairment from his accident and indicated that he was "*fit, well, and able to be gainfully employed*". He further stated that he felt [the Appellant] had made "*a satisfactory recovery from the effects of his accident*".

[The Appellant] was also evaluated in April 1995 and treated by [Appellant's chiropractor] who indicated in a letter of June 18, 1996, that [the Appellant] had "made great gains in terms of reducing his daily subjective complaints, and increasing dynamic strength and mobility in the injured musculature" after receiving regular chiropractic treatment. When asked specifically by the case manager on July 26, 1996, if [the Appellant] could work, [Appellant's chiropractor] stated that he felt he was capable of some form of employment, just not as a heavy labourer.

In September 1996, after a failed attempt at an Independent Chiropractic Examination, [independent chiropractor] noted in his report to MPIC that, "*I did state to him that I would bring to your attention the matter of him possibly seeing a psychologist specializing in chronic pain*". [Appellant's chiropractor] makes a similar recommendation on June 5, 1997. [Appellant's chiropractor] details ongoing mid to low back pain and spasm and recommends a referral for pain management. However, it is unclear whether [Appellant's chiropractor] was recommending medically or psychologically oriented pain management.

In his report of December 8, 1998, [Appellant's physical medicine and rehab specialist] documents that [the Appellant] has "*a severe form of somatoform pain disorder*". In a report dated March 8, 1999, [Appellant's doctor #3]'s opines that "*it is my personal opinion that the soft tissue injury from the accident of July 1994 was the trigger mechanism for the development of*

the patient's severe form of somatoform pain disorder". [Appellant's doctor #3] provides an additional report dated July 28, 2000 reiterating his opinion that "*the soft tissue injuries from the accident in July 1994 were the trigger mechanism for the development of the patient's somatoform pain disorder*". [Appellant's doctor #3] indicates that [the Appellant] continues to "*suffer from lower back pain and muscle spasms which prevent him from performing any significant physical activity over a longer period of time*".

In the psychological assessment conducted in August 2000, [Appellant's psychologist #2] and [Appellant's psychologist #3], conclude that there is "*little likelihood that he is malingering*" and that "[the Appellant] *is suffering from a Somatoform Pain Disorder which had its onset shortly after his motor vehicle accident in 1994*". In August 2001, after assessing [the Appellant], [MPIC's psychologist] concurred with [Appellant's psychologist #3]/[Appellant's psychologist #2] that [the Appellant] met the full DSM-IV criteria for having a Chronic Pain Disorder associated with Psychological Features. With respect to the Appellant's employability, [MPIC's psychologist] felt that "*While he may not be able to do heavy labour, it is likely from his current presentation that he is capable of some kind of work*".

In their report of November 10, 2001, [Appellant's psychologist #2] and [Appellant's psychologist #3] comment on the issue of the Appellant's employability that "*Although it seems possible that* [the Appellant's] *condition has deteriorated through years of not receiving address of his psychological difficulties, it does seem as though his situation would nonetheless have already been serious in January, 1995, and that he would not likely have been able to work effectively prior to appropriate treatment, which would presumably have been a project of some duration*".

The foregoing analysis establishes that the Somatoform Pain Disorder became a documented impairment as of December 1998, when diagnosed by [Appellant's physical medicine and rehab specialist] and [Appellant's doctor #3]. However, on a balance of probabilities, the Commission finds that the pain disorder was likely firmly in place before then, although not as early as January 1995. [MPIC's psychologist], in his report of November 18, 2001 notes that:

> In my experience, general practitioners such as [Appellant's doctor #2] are often called upon to provide assessments of a person's abilities both physical and psychological and that this is fairly common in the insurance industry. Furthermore, it is often the family doctor who detects some sort of psychiatric illness and refers on to a psychiatrist and/or psychologist for further assessment and treatment. Therefore, to suggest that a general practitioner's assessment is inadequate to detect psychological difficulties or that such an evaluation is beyond the scope of their practice is in my opinion, erroneous.

[Appellant's doctor #2] was familiar with [the Appellant]. He had treated him for approximately two years before the accident for various medical problems and treated him after the accident. Based on his knowledge of the Appellant, his opinion in December 1994, that the Appellant was "*fit, well, and able to be gainfully employed*" is determinative of the Appellant's capacity at that time. Certainly one would expect that if [the Appellant] was demonstrating psychological difficulties at that time, [Appellant's doctor #2] would have recognized those symptoms, and made the appropriate referral.

Based on the observations of the case manager, [Appellant's chiropractor] and [independent chiropractor], the Commission concludes that by September 24, 1996, when [independent chiropractor] recommended a referral to a psychologist specializing in chronic pain, [the Appellant's] psychological difficulties had manifested themselves to a degree as to prevent [the Appellant] from working. From that point in time, based on a balance of probabilities, [the Appellant] was unable to hold employment due to a mental injury that was caused by the accident.

We conclude, based on the totality of the evidence before us that:

1. [the Appellant] suffers from a Somatoform Pain Disorder;
2. the onset of the Somatoform Pain Disorder is attributable to the accident of July 14, 1994;
3. [the Appellant] was correctly determined in accordance with Section 106 at an entry-level position as a file clerk, for the purpose of compensation from the 181st day after the accident; and
4. the Somatoform Pain Disorder prevented [the Appellant] from holding the determined employment from September 24, 1996 and thereafter.

As a result, we find that [the Appellant] is entitled to I.R.I. from September 24, 1996 onward, pursuant to s. 84(1) of the MPIC Act.

Subsection 84(3) of the MPIC Act and subsection 5(2) Of Manitoba Regulation 39/94 are applicable to the determination of the income replacement indemnity for [the Appellant]. Subsection 5(2) of Manitoba Regulation 39/94 provides as follows:

> **GYEI of temporary earner or part-time earner after 180th day**
> **5(2)** The gross yearly employment income for a temporary earner or part-time earner after the 180th day following the date of the accident is the greatest of the amounts determined under subsection (1) and sections 6 and 7.

In October 2001, MPIC had determined the income replacement indemnity, corresponding to the determined employment of a file clerk, for [the Appellant]. Given [the Appellant's] 5-year history, the corresponding Gross Yearly Employment Income (GYEI) subsequent to the 180th day was established at an annual salary of minimum wage, being the greatest of:

- gross yearly employment income for the 1st 180 days;
- minimum wage;
- annualized employment income not held at the time of the motor vehicle accident, but in the last 5 years; and
- Schedule C.

Those calculations had been done on the basis that [the Appellant] was a non-earner in the first 180 days following his accident. Given the Commission's determination that [the Appellant] was a temporary earner during the first 180 days after the motor vehicle accident, MPIC will now be required to calculate his gross yearly employment income for the first 180 days to ascertain whether or not that results in a greater GYEI for the Appellant. Accordingly, the determination of the Appellant's income replacement indemnity from September 24, 1996 onward, is referred back to MPIC.

3. Entitlement to coverage for ongoing medical expenses and treatment costs

In his report of August 8, 2001, [MPIC's psychologist] made the following recommendations:

> In terms of recommendations for treatment (Question 5), it is apparent that [the Appellant] does need some psychological help in terms of pain management and anger management. A male therapist would probably be best given his style of interaction. [Text deleted] or [text deleted] are two psychologists who might be a good "match" for [the Appellant]. He might also benefit from a consultation with at psychiatrist or physiatrist to explore possible pharmacological interventions for pain and anger management. Part of his treatment would also need to involve some component of physiotherapy and occupational therapy to assess his physical limitations and explore vocational options with him. Involvement in a rehabilitation program such as at the [text deleted] Centre could provide such expertise.

In her letter dated August 31, 2001, counsel for MPIC advised as follows:

> It is clear that [the Appellant] does require a treatment regime and while the Corporation remains of the position that it requires further information to properly evaluate this claim, it is prepared on a "without prejudice" basis to both manage and fund the type of treatment program recommended by [MPIC's psychologist]. It must be noted that [the Appellant] has previously declined psychological intervention on two occasions in 1995.

Subsequently, MPIC's case manager arranged for [Appellant's psychologist #4] to assess the Appellant and to provide a narrative report detailing his findings, including, his diagnosis of [the Appellant's] current psychological condition and his recommended treatment plan to address any psychological condition as diagnosed. That assessment and report were not completed by the final date of hearing before the Commission.

Section 136 of the MPIC Act provides that:

> **Reimbursement of victim for various expenses**
> **136(1)** Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:
>
> (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.

Section 5 of Regulation 40/94 provides that:

> **Medical or paramedical Care**
> **5** Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:
>
> (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or as prescribed by a physician.

Having determined that the onset of the Somatoform Pain Disorder is attributable to the accident

of July 14, 1994, we find that the treatment recommendations made by [MPIC's psychologist] in his report of August 8, 2001 are required in order to treat the Appellant's psychological and physical conditions. Accordingly, the Commission finds that the treatment expenses are medically required within the meaning of the regulation. Therefore, the matter of an ongoing treatment regime is referred back to MPIC's case manager, in order to implement and manage the type of treatment program recommended by [MPIC's psychologist].

Dated at Winnipeg this 21st day of March, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

COLON C. SETTLE, Q.C.