Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-53

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms. Yvonne Tavares** **Mr. Wilson MacLennan**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Tom Strutt.**
HEARING DATES:	**January 16, 2002, and May 23, 2002**
ISSUE(S):	**1. Entitlement to IRI during the first 180 days after the motor vehicle accident of June 7, 1997;** **2. Entitlement to Reimbursement of cost of Chiropractic treatments;** **3. Entitlement to IRI beyond August 15, 1999.**
RELEVANT SECTIONS:	**Sections 70(1), 84(1), 106, 110(1)(c) and 136(1) of The Manitoba Public Insurance Corporation Act (the 'MPIC Act'); Sections 6 and 8 of Manitoba Regulation 37/94 and Section 5(a) 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, [text deleted], was involved in two separate motor vehicle accidents. On June 7, 1997, her vehicle struck a deer on the highway, and on February 21, 1998, her vehicle was rear-ended. As a result of the injuries she sustained in those accidents, she became entitled to certain benefits pursuant to the Personal Injury Protection Plan ('PIPP') contained in the MPIC Act and Regulations.

The Appellant is appealing two separate decisions of MPIC's Internal Review Officer with respect to the termination of her PIPP benefits. With regards to the Internal Review decision of December 6, 1999, she is appealing the Internal Review Officer's decision to confirm her termination of Income Replacement Indemnity ("IRI") benefits as of August 15, 1999, and termination of coverage for chiropractic care effective July 23, 1999.

With regards to the Internal Review decision of June 26, 2000, she is appealing the Internal Review Officer's decision which denied her IRI benefits for the first 180 days after the motor vehicle accident of June 7, 1997.

1. Entitlement to IRI during the first 180 days after the motor vehicle accident of June 7, 1997

Section 83(1)(a) of the MPIC Act provides that:

> **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.

At the hearing of this matter on May 23, 2000, an adjournment was granted to the Appellant to allow her additional time to gather evidence and summon witnesses on the issue of whether she would have held employment during the first 180 days after the motor vehicle accident of June 7, 1997. A hearing with regard to this issue will be reconvened at a time and date to be confirmed.

2. Entitlement to reimbursement of cost of chiropractic treatments

The Appellant is seeking reimbursement of costs incurred for chiropractic care from July 23, 1999, to October 20, 2000. [The Appellant] commenced chiropractic care with [Appellant's chiropractor #1] on September 20, 1997, for treatment of the injuries she sustained in the motor vehicle accident of June 7, 1997. In a report dated October 14, 1997, he documented that [the Appellant] had multiple symptoms involving her neck, back and extremities along with associated headaches.

Throughout the next several months, [Appellant's chiropractor #1] provided chiropractic adjustments for [the Appellant] and documented slow improvement in her overall condition. In his report dated February 3, 1998, [Appellant's chiropractor #1] notes the following with regard to [the Appellant's] condition:

> At the time of [the Appellant's] initial exam, approximately 3-4 months following the motor vehicle accident, she reported experiencing moderate to severe, constant, daily headaches. She also reported pain, stiffness and grinding in the neck along with shoulder pain radiating into the first and second digit of the right upper extremity. Also noted were costovertebral and costochondral pain. The patient's appearance was tense and she reported mild to moderate anxiety. Low back pain and right-sided hip pain associated with intermittent right leg pain were also noted. At the time of the initial examination, [the Appellant] reported that her chief complaint was of constant, severe headaches associated with severe neck pain and discomfort. Occasional difficulty breathing was included in the patient's subjective notes due to chest and rib pain. These problems are reported by the patient to be of sudden onset on June 7, 1997, and of traumatic etiology following the motor vehicle accident.
>
> ….
>
> The diagnosis after examining [the Appellant] is as follows:
>
> 1. An acute sprain/strain reaction to a hyperflexion/hyperextension reaction due to an acceleration/deceleration injury.
> 2. Lumbosacral sprain/sprain [*sic*].
> 3. Sacro-iliac sprain/strain.
> 4. Cervical sprain/strain associated with cervicogenic headaches and brachial radiculopathy.
> 5. Dorsal and cervical myositis.
> 6. Traumatic spinal subluxation complex.

7. Costochondral/costovertebral dysfunction.

…

[The Appellant] continues to demonstrate steady ongoing progress with treatment. Further care is required to restore proper spinal biomechanics and achieve maximal medical improvement. Care plan presently consists of treatment 10 to 12 times per month and will continue until patient is able to maintain proper spinal alignment. Active stretching as well as specific exercises have also been prescribed and will increase in frequency and intensity as care continues. Care plan will diminish with observed progress.

It is my opinion that [the Appellant] has not reached maximum medical improvement and that her functional capacity will not allow her to return to work at this time. It is quite evident that pre-accident status has not been achieved over the last several months. The injuries sustained by [the Appellant] in the June 1997 motor vehicle accident were extensive and still require chiropractic care.

The Appellant was involved in a second motor vehicle accident on February 21, 1998. In a report dated April 25, 1998, [Appellant's chiropractor #1] made the following comments with regards to her condition following the second motor vehicle accident:

Subsequent to this latest accident, the following areas of exacerbation were noted. Headaches returned on a daily basis and increased in severity. Severe neck pain and associated bilateral upper extremity pain and paresthesias. Exacerbation of costoverbertral and costochondral pain. Lower back pain and bilateral hip pain.

Objective evaluation following the February 21st accident also revealed aggravation of existing condition. Neurological, orthopedic and range of motion deficits were noted and listed in detail in previous reports dated March 9 and April 3, 1998. [The Appellant] remains a WAD 3 at this time and is showing steady ongoing progress.

…

At this time, [the Appellant] continues to show ongoing progress with treatment. It is evident that she continues to undergo neurological and muscular compromises. [The Appellant] has not reached maximum medical improvement. The aggravation and exacerbation of previous injuries as a result of the February 21, 1998 motor vehicle accident are extensive. Return to work at this time is not advised. [The Appellant] will be re-assessed approximately two months from this report and her functional capacity evaluated once again at that time.

The Appellant underwent an Independent Chiropractic Examination on August 26, 1998, with [independent chiropractor]. In his report, dated September 10, 1998, [independent chiropractor] concluded the following, based upon his examination:

> [The Appellant] will be unable to complete nor benefit from a work hardening or rehabilitation program until she undergoes psychological counselling to address her chronic pain syndrome. A chronic pain program as outlined by [MPIC's doctor] is necessary. I do believe that there are numerous neuro-musculoskeletal pain generators which do need to be addressed as well.
>
> [The Appellant] is comfortable with [Appellant's chiropractor #1] and should continue to have access to treatment at a frequency that works in conjunction with the multidisciplinary approach. Treatment takes on the role of supporting the patient through the invariable exacerbations that will occur as [the Appellant] is challenged to become more active.
>
> Specific chiropractic adjustments to the occiput should be explored if not already attempted to address [the Appellant's] headaches. A variety of different techniques and approaches should be explored. It is my opinion that [the Appellant] would benefit from soft tissue therapy/massage to the upper intercostal, pectoralis minor, scalene and trapezius musculature in conjunction with specific stretches (ie. spray and stretch) to address the increase in arm dysfunction. This can be performed by either [Appellant's chiropractor #1] or a massage therapist versed in the treatment of Thoracic Outlet Syndrome.

In a subsequent review of the file, [text deleted], medical consultant to MPIC's Claims Services Department, noted with respect to the Appellant's ongoing chiropractic treatments that:

> After reviewing information obtained in [the Appellant's] file, it is my understanding that 15 months of chiropractic treatments with [Appellant's chiropractor #1] has not resulted in any functional improvement or prolonged relief of symptoms. It is my opinion that 15 months of chiropractic treatment is ample time for one to determine if in fact such treatments will produce a long-term benefit. I stated to [the Appellant] and [the Appellant's husband] that considering her inability to improve her functional capabilities following 15 months of chiropractic treatments, further treatments cannot be shown as being required in the management of the medical conditions arising from [the Appellant's] motor vehicle collision.
>
> I recommend that a review of [the Appellant's] file by a Chiropractic Consultant on the Medical Services Team be performed in order to provide an opinion with regards to the need for further chiropractic care.

As a result of [MPIC's doctor's] recommendation, a review of [the Appellant's] file was undertaken by [text deleted], chiropractic consultant to MPIC's Claims Services Department. In

his Inter-departmental Memorandum dated March 3, 1999, [MPIC's chiropractor] concluded the following:

> After thoroughly reviewing this file, as well as discussing it in detail with [Appellant's chiropractor #1], I do not find any compelling evidence that further chiropractic intervention is therapeutically necessary. She has had in excess of 100 treatments in the previous 15 months and has yet to return to work and still reports subjectively dramatic symptomatology. The justification used by [Appellant's chiropractor #1] in assessing the need for ongoing care seem to be the patient's subjective reports that the chiropractic adjustment was the only thing that was helping her. The file, however, does not indicate significant objective improvement despite the significant mount of care rendered so far.

As a result of concerns that the Appellant had about neurological deficits, she attended for a neurological examination with [Appellant's neurologist] on March 23, 1999. In [Appellant's neurologist]'s report of the same date, he notes the following:

> Cranial nerves one to twelve were intact, motor and sensory examination, reflexes, plantars, stance, gait and Romberg's tests were all normal. Funduscopy, optic discs, external ocular movements and visual fields were intact.
>
> Regarding the global weakness of the entire right upper limb, it is my opinion that this was not organic. With distraction, strength was normal at every joint tested. She did tend to flex the limbs during the examination.
>
> However, even in this position, strength was normal.
>
> Impression: I can find no evidence of an organic defect in this lady. When distracted, or when demonstrating her symptoms, this lady showed no evidence, that she is suffering any pain in any location whatsoever.
>
> It is my opinion that [the Appellant] has completed recovered from any ill effect of her accident. She does not require any treatment of any kind.
>
> She does not require investigations of any kind.
>
> Furthermore, it is my opinion, that [the Appellant] is completely fit to return to work at this time.

[MPIC's doctor] of MPIC's Claims Services Department once again had the opportunity of reviewing [the Appellant's] file. In an Inter-departmental Memorandum dated May 27, 1999, [MPIC's doctor] concluded the following:

> After reviewing the information obtained from these reports in conjunction with that previously reviewed, it is my opinion that [the Appellant] has reached maximal medical improvement with regard to the treatment interventions that are required to address the medical conditions (i.e. musculotendinous strains of the spine and shoulder girdle regions) that developed as a direct result of the motor vehicle collision she was involved in. It appears that [the Appellant's] chronic pain behaviour (referred to in one of the reports as a chronic pain syndrome) limited the potential benefit she could have obtained from the programs provided to her. There is no documentation identifying the medical condition that would account for [the Appellant's] chronic pain complaints.

Based on [MPIC's doctor's] opinion, the case manager wrote to the Appellant on August 6, 1999, to inform her that no further reimbursement of chiropractic treatments would be considered by MPIC.

The Appellant sought an Internal Review of that decision. In support of her Application for Review, the Appellant submitted a narrative report from [Appellant's chiropractor #2], [text deleted]. In his report dated November 2, 1999, [Appellant's chiropractor #2] noted that he had been treating the Appellant since July 23, 1999, and that with treatment, the Appellant's condition had continued to improve. Accordingly, it was his opinion that since the Appellant continued to improve with his treatment, she should not be denied coverage, as she had not reached maximum medical improvement.

In a decision dated December 6, 1999, the Internal Review Officer confirmed the decision of the case manager. In his decision, the Internal Review Officer noted the following:

> Once again, it is clear from the file that the adjuster carefully considered all of the competing opinions in arriving at his decision to terminate your chiropractic coverage effective July 23, 1999. I am unable to say that he erred in relying on the opinions of [Appellant's neurologist], [MPIC's doctor] and [MPIC's chiropractor] in arriving at that decision, and I am, therefore, confirming the termination at this time.

The Appellant has now appealed from that decision to this Commission. The issue which requires determination in [the Appellant's] appeal is whether or not ongoing chiropractic treatment beyond July 23, 1999, was medically required.

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

Section 136(1)(a) of the Act:

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

Section 5(a) of Manitoba Regulation 40/94:

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

In support of her appeal, [the Appellant] submitted an additional medical report from [Appellant's chiropractor #1], dated March 30, 2000. In that report, [Appellant's chiropractor #1] notes the following:

> At the time of [the Appellant's] re-evaluation exam on March 30, 2000 she reported experiencing the following symptoms: soreness and stiffness in the neck, grinding in the neck along with shoulder pain radiating into the first and second digit of the right upper extremity. Also noted were costovertebral and costochrondral pain. Lower back pain and right-sided hip pain associated with intermittent right leg pain were also noted. Difficulty breathing was included in

> the patient's subjective notes due to chest and rib pain. These problems are reported by the patient to be of sudden onset on June 7, 1997, and of traumatic etiology following the motor vehicle accident. [The Appellant] stated that these problems had been constant since their onset immediately following the accident. Although these symptoms still remain, [the Appellant] notes a slight improvement in their intensity and frequency in the last several months.

[The Appellant] also submitted a medical report from [Appellant's chiropractor #2], dated May 13, 2000. In his report, [Appellant's chiropractor #2] expresses the following opinion:

> As previously stated in our November 02, 1999 report, and based on these most recent facts, it is apparent that [the Appellant] continues to improve with our treatment. She is now at a point in her recovery where work activities are being contemplated, given that her strength and functional capabilities have improved sufficiently to tolerate a higher level of daily activity.
>
> Any suggestions that [the Appellant] had previously reached maximum improvement are inaccurate, as she has improved with the treatment she has received in our office.
>
> …
>
> [The Appellant] has remained consistent in her subjective presentation since the onset of her injuries. We have presented both subjective and objective documentation clearly indicating improvements. To not allow coverage for treatment that is benefiting this patient goes against what MPI's obligations are to further improve this patient's condition.
>
> [the Appellant] is not yet at maximum medical improvement, as she continues to progress both subjectively and objectively with our care.

At the hearing of this matter, [Appellant's representative] submitted, on behalf of the Appellant, that the fact that the Appellant has subjectively improved with ongoing chiropractic care demonstrates that she was not at maximum medical improvement when MPIC terminated reimbursement of funding for chiropractic care. [Appellant's representative] argued that the Appellant has continued to improve with that care and, accordingly, she should be reimbursed for the treatments that she has paid for between July 23, 1999 and October 20, 2000.

Counsel for MPIC submits that there is no objective evidence that the Appellant required chiropractic care in order to recover from any injuries sustained in the motor vehicle accidents of June 7, 1997, and February 21, 1998. Counsel for MPIC relies on [MPIC's chiropractor's] Inter-departmental Memorandum dated January 10, 2002, wherein [MPIC's chiropractor] notes that:

> 3. Ongoing chiropractic benefits.
>
> Based on the review of the file, again, principally [Appellant's chiropractor #2's] recent report, there is no compelling objective evidence that suggests the necessity for ongoing chiropractic treatment benefits as it would relate to the motor vehicle accident related injuries. By July 1999 she had had over 100 chiropractic interventions and had not returned to work. Although [Appellant's chiropractor #2] indicates improvement in his reports it does not seem that these treatments were particularly successful in returning her to work.
>
> The file contents are most supportive of the previously mentioned accident-related diagnoses. It is my opinion that by July of 1999 this claimant had an adequate exposure to appropriate treatment interventions to provide maximal therapeutic benefit related to those organic accident-related diagnoses mentioned.
>
> There is numerous indications on file that the claimant may also suffer from a chronic pain syndrome, however, ongoing chiropractic intervention, as described in this file, is unlikely to have a therapeutic effect greater than that which has been achieved during the funded course of treatment.

In order to qualify for funding under the Personal Injury Protection Plan contained in the MPIC Act and Regulations, expenses must be incurred by a victim because of the accident and must be medically required. In the case at hand, as of July 1999, the Appellant had had in excess of 100 chiropractic treatments since the date of the first motor vehicle accident, yet there had been little indication of a reduction in symptomatology as treatment had continued. The facts of the case at hand, including the rather extensive amount of chiropractic treatments undertaken by the Appellant, coupled with the lack of improvement in her condition, lead us to the conclusion that the Appellant had likely reached maximum therapeutic benefit from chiropractic care by July 23, 1999. We are of the opinion that MPIC was justified in terminating reimbursement for further chiropractic care for [the Appellant] on July 23, 1999, as it did.

3. Entitlement to IRI beyond August 15, 1999

At the time of the motor vehicle accident on June 7, 1997, [the Appellant] was employed as a greenhouse worker with [Text deleted]. She had been employed in that capacity since April 8, 1997. Since [the Appellant] had been employed for less than one year at that employment on the date of the motor vehicle accident, she was classified as a "temporary earner" within the meaning of the MPIC Act.

Section 70(1) of the MPIC Act provides the definition of temporary earner as follows:

> **"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 sets out the meaning of temporary employment, 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).

As a temporary earner, the Appellant's entitlement to IRI from the 181st day post-motor vehicle accident is determined in accordance with Section 84(1) of the MPIC Act, which provides 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.

Section 106 of the MPIC 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.
>
> **Type of employment**
> **106(2)** An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

The Appellant's determined employment was that of a dietary aide. The Appellant was paid Income Replacement Indemnity benefits in accordance with that determined employment from the 181st day after the June 7, 1997 accident until August 15, 1999, at which time Income Replacement Indemnity benefits were terminated.

In his decision letter dated August 6, 1999, the case manager advised the Appellant that:

> Based on the medical information obtained from the various reports contained on file, our Medical Services conclude that you have recovered from the motor vehicle collision related medical conditions and these conditions no longer factor into your subjective complaints of pain. There is no medical documentation identifying an impairment of physical function arising from these conditions that would prevent you from returning to the workplace. The information indicates that your perceived limitation of function is secondary to your chronic pain which defies medical explanation.
>
> In accordance with Section 110(1)(c), there is no medical reason why you cannot return to the employment determined for you under Section 106(1). For your reference, we quote these sections:

> **Events that end entitlement to I.R.I.**
> **110(1)** A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:
>
> (c) the victim is able to hold an employment determined for the victim under section 106.

> Based on the above, no further consideration can be given to Income Replacement Indemnity. In my telephone conversation with your husband, [text deleted], on July 23, 1999, I did, however, confirm that Income Replacement Indemnity benefits would be extended to you up to and including August 15, 1999 which would allow the necessary time to provide a written decision to you pertaining to your benefits.

The Appellant sought an internal review of that decision. In the Internal Review decision dated December 6, 1999, the Internal Review Officer upheld the decision of the case manager and noted that:

> It is clear from the file that the adjuster carefully considered all of the competing opinions in arriving at his decision to terminate your IRI effective August 15, 1999. I am unable to say that he erred in relying on the opinions of [Appellant's neurologist] and [MPIC's doctor] in arriving at that decision, and I am, therefore, confirming the termination at this time.

The Appellant has now appealed from that decision to this Commission. The issue which requires determination in this appeal is whether or not the termination of the Appellant's Income Replacement Indemnity benefits pursuant to Section 110(1)(c) of the MPIC Act was correct.

At the hearing of this matter, [Appellant's representative] submitted, on behalf of the Appellant, that at no time between August 15, 1999, and October 20, 2000, was the Appellant capable of holding the determined employment of a dietary aide. He states that from a physical capacity perspective, [the Appellant] was simply not able to do that job.

In support of his position, [Appellant's representative] relies on the chiropractic evidence from [Appellant's chiropractor #1] which, he submits, illustrates an inability to return to work. In [Appellant's chiropractor #1's] medical report dated February 3, 1998, he notes the following:

> Given that [the Appellant] is currently unemployed, it is my understanding that her functional capacity will be measured against her last full time employment as a dietary aid. Based on the most recent objective exam performed January 27, 1998 in my office, it is my professional opinion that [the Appellant's] present condition will not allow her to perform the job duties required of dietary aid. At this time it is apparent that [the Appellant's] functional capacity is very limited. Presently even daily stretching and a light exercise routine appears to exacerbate and at times cause minor setbacks to her healing. Even if she is careful of certain postures and does not experience any setbacks or symptoms, it is likely that her spine will be subject to postural and mechanical disadvantages. [The Appellant] has had to alter her lifestyle due to the pain felt in the lower back, neck, right upper extremity and recurring, intermittent daily headaches. The pre-accident activity level that [the Appellant] enjoyed has diminished on account of the debilitating pain experienced following any physical activity. I expect that there is a probability of recurrent low back pain, neck pain and muscle pain given her signs and symptoms and as a result the prognosis remains guarded.

[Appellant's representative] also relied on [Appellant's chiropractor #1's] letter dated September 29, 1999, wherein he notes that:

> [The Appellant's] MPIC claims for injuries suffered in the two motor vehicle accidents in question were eventually closed and financial responsibility for treatment of any kind terminated. At the time of closure, [the Appellant's] functional capacity had not yet improved enough to consider return to work. Although [the Appellant's] progress was slow and difficult, she did show significant improvement while actively pursuing the rehabilitation programs.

Additionally, [Appellant's representative] relied on the report of [Appellant's chiropractor #3], [text deleted], dated September 17, 1999, which stated that:

> Given the length of time and the severity of her condition at the time of examination, her prognosis largely depends on her progress and is therefore guarded. Physical work should be very limited as prolonged postures as well as bending, lifting and carrying may aggravate her condition.

[Appellant's representative] notes that the work-hardening and physical reconditioning program which the Appellant undertook through the [rehab clinic] was not successful in improving the

Appellant's functional capacity. He refers to the Discharge Report dated April 20, 1999, which indicates that the Appellant was discharged from the program because of minimal progress and a lack of improvement in her physical function. Accordingly, [Appellant's representative] submits that in the opinion of five practitioners – the three chiropractors, the occupational therapist, and the physiotherapist – [the Appellant] did not have the functional capacity to return to work in the summer of 1999.

Counsel for MPIC refers the Commission to Section 8 of Manitoba 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 there is no evidence of a physiological injury or mental disorder disqualifying the Appellant from the determined employment because of injuries related to the motor vehicle accidents. In support of this submission, he relies on the report of [Appellant's neurologist] who stated in his report dated March 23, 1999, that:

> I can find no evidence of an organic defect in this lady. When distracted, or when demonstrating her symptoms, this lady showed no evidence, that she is suffering any pain in any location whatsoever.
>
> It is my opinion that [the Appellant] has completely recovered from any ill effect of her accident. She does not require any treatment of any kind.
>
> …
> Furthermore, it is my opinion, that [the Appellant] is completely fit to return to work at this time.

Counsel for MPIC also argues that the various chiropractic assessments of [Appellant's chiropractor #1], [Appellant's chiropractor #3] and [Appellant's chiropractor #2] are so flawed that no weight should be given to them. The findings reported by each of the Appellant's chiropractors are inconsistent. [Appellant's chiropractor #2's] findings go far beyond what [Appellant's chiropractor #1] reported, which went far beyond what [Appellant's chiropractor #3], and even [independent chiropractor], noted in their assessments.

Counsel for MPIC concludes that there is no evidence that the Appellant is unable to hold employment because of a physical or mental injury caused by the accident which renders her entirely or substantially unable to perform the essential duties of the determined employment. Accordingly, he submits that the decision of the Internal Review Officer, dated December 6, 1999, 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 accidents of June 7, 1997 and February 21, 1998, prevented her from holding employment as a dietary aide, from August 15, 1999 and thereafter.

There is a lack of objective medical evidence on the file which supports the Appellant's inability to return to work as of August 15, 1999. Although her chiropractic caregivers defend her functional incapacity at that time, their reports and their objective findings are inconsistent and therefore provide an unreliable basis for determining [the Appellant's] functional capacity. Rather we prefer the report of [Appellant's neurologist], who in March of 1999, presents an objective view of the Appellant's functional status. It was his opinion that the Appellant "*is completely fit to return to work at this time*". We conclude, therefore, that the physical injuries

which the Appellant sustained as a result of the motor vehicle accidents did not substantially or entirely prevent her from returning to work as a dietary aide as of August 15, 1999.

No evidence was submitted by the Appellant to provide a psychological basis for her chronic pain behaviour, which could explain her inability to return to work. The information obtained from the reports submitted by the [rehab clinic] indicate that her subjective complaints of increasing pain were one of the main reasons that [the Appellant] was not able to progress through the program. However, the therapists involved in her program were unable to identify a medical condition that would account for [the Appellant's] functional limitations and pain complaints.

In the Psychological Treatment Summary Report submitted by [text deleted], clinical psychologist, he noted that:

> In our final session, [the Appellant] informed me that she did not find our sessions helpful although she was benefiting from her OT and PT participation. She also stated that she was coping fine with her pain, but would contact me if the need arose. As such, we decided to stop treatment sessions at this time. In my opinion, [the Appellant's] mood is stable and she is aware of the pain management strategies we discussed. Whether she uses these strategies is her responsibility.

Based on the Appellant's own statement that she was coping fine with her pain, we conclude that any psychological condition which the Appellant sustained as a result of the motor vehicle accidents did not substantially or entirely prevent her from returning to work as of August 15, 1999.

Accordingly, we find that the Appellant has failed to show, on a balance of probabilities, that a physical or mental injury that was caused by the accidents rendered her entirely or substantially unable to perform the essential duties of employment as a dietary aide from August 15, 1999.

For these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date December 6, 1999.

Dated at Winnipeg this 25th day of July, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

WILSON MacLENNAN