

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-86**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Neil Cohen
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Kathy Kalinowsky and Mr. Terry Kumka.

HEARING DATE: July 11 & 12, 2006 and September 11, 2006

ISSUE(S): Termination of the Appellant's Income Replacement Indemnity benefits in January 2006

RELEVANT SECTIONS: Sections 105, 150, 153(1), 169 and 171 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94

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

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on June 14, 1994 and, as a result of this accident, has suffered motor vehicle accident injuries. For a period of three (3) years prior to this motor vehicle accident, the Appellant was in receipt of a monthly disability payment from Canada Pension Plan ('CPP') for a disability in respect of a heart condition. As a result of the motor vehicle accident injuries on June 14, 1994, the Appellant had received Personal Injury

Protection Plan ('PIPP') benefits under the MPIC Act which initially amounted to a lump sum student indemnity and, effective July 1, 1996, to Income Replacement Indemnity ('IRI') benefits which had continued without interference for a period of approximately nine (9) years and six (6) months until the month of January 2006.

Case Manager's Decision

On January 5, 2006, after a period of nine (9) years and six (6) months, MPIC's Senior Case Manager wrote to the Appellant and stated that he had reviewed the existing information MPIC had on file, together with a file that he had received from MPIC in the month of September 2000. In light of the information obtained primarily from the CPP file, the case manager advised the Appellant:

In light of the information on file, it is clear that you were not capable of holding an employment at the time of the accident because of the prolonged and severe nature of the Reflex Sympathetic Dystrophy. In addition, you were receiving CPP disability benefits at the time of the accident. Therefore, as you were not employable at the time of the June 14, 1994 accident, you do not qualify for IRI benefits in accordance with Section 105 of the Act.

Application for Review

The Appellant made Application for Review of the case manager's decision in a letter dated March 2, 2006. In this Application for Review counsel for the Appellant asserted that the case manager's decision was wrong for the following reasons:

1. *Res Judicata* and Abuse of Process: [The Appellant's] entitlement to IRI was decided nearly 10 years ago. The decision has been confirmed on numerous occasions. The issue is *res judicata* and it is an abuse of process for the Corporation to re-determine the issue.
2. Lack of Jurisdiction: The Corporation had no jurisdiction to make the decision. The statute does not give the Corporation authority to make the decision. Further, the Corporation has no jurisdiction since the issue of entitlement to IRI is currently before the AICAC.

3. The decision is incorrect: The decision of [text deleted] misstates the medical evidence reviewed, and fails to consider the proper medical evidence on file. The previous decision of the Corporation was correct in its determination that [the Appellant] was capable of employment prior to the accident on June 14, 1994 and entitled to IRI.

Internal Review Officer's Decision

The Internal Review Officer, in a decision dated May 31, 2006, confirmed the decision of the case manager and dismissed the Appellant's Application for Review. As a result the Appellant filed an appeal with this Commission dated June 7, 2006 setting out the same grounds for appeal as the Appellant had set out in the Application for Review.

Appeal

The Commission finds that MPIC was not entitled, pursuant to Section 105 of the Act, to terminate the Appellant's IRI for the following reasons:

1. there was no new information under Section 171(1) of the Act which would permit MPIC to make a fresh decision in respect of the Appellant's entitlement to IRI benefits.
2. if there was new information within the meaning of Section 171(1) of the Act, MPIC did not exercise the appropriate due diligence in obtaining the new information and, as a result, this new information is not admissible in order to establish that, pursuant to Section 105 of the Act, the Appellant was precluded from receiving IRI benefits.
3. MPIC's decision to reconsider granting IRI benefits to the Appellant was untimely having regard to the provisions of Section 171(2) of the Act and, as a result, MPIC was not entitled to reconsider granting IRI benefits to the Appellant in accordance with this provision.

4. in the alternative, if Sections 171(1) and (2) of the Act were complied with by MPIC, the Commission finds that MPIC had correctly determined that Section 105 of the Act did not preclude MPIC from granting IRI benefits to the Appellant in the month of January 1996 and, as a result, MPIC erred when it terminated the Appellant's IRI benefits in the month of January 2006.

The relevant provisions of the Act in respect of this appeal are:

No entitlement to I.R.I. or retirement income

[105](#) Notwithstanding sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

Jurisdiction of corporation

[169\(1\)](#) Subject to subsection 196(2) (appeal under this Part or Workers Compensation Act), the corporation has exclusive jurisdiction to decide any matter related to compensation under this Part and to review any such decision.

Corporation may delegate its powers

[169\(2\)](#) The corporation may authorize one or more of its officers or employees to exercise a power or perform a duty of the corporation under this Part, subject to such conditions as the corporation may decide, and a power may be exercised or a duty may be performed by any officer or employee who is so authorized.

Corporation may reconsider new information

[171\(1\)](#) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Claims corporation may reconsider before application for review or appeal

[171\(2\)](#) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

- (a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or
- (b) the decision contains an error in writing or calculation, or any other clerical error.

Submissions

MPIC submitted that:

1. as a result of receiving the complete file from the CPP authority in the year 2000, it concluded, approximately six (6) years later in January 2006, that it had obtained new information that clearly demonstrated that the Appellant was regularly incapable of holding employment prior to the motor vehicle accident on June 14, 1994.
2. the Appellant was precluded from receiving IRI benefits pursuant to Section 105 of the Act.
3. it was correct in terminating the Appellant's IRI benefits pursuant to Section 105 of the Act.
4. nothing in the Act limits MPIC's ability to correct any errors it had previously made in respect of granting IRI benefits to the Appellant.
5. in 1996 the case manager had misapplied and/or misinterpreted Section 105 of the Act and, as a result, the Appellant was granted IRI benefits.
6. when it discovered its previous error in 2006 it terminated the Appellant's IRI benefits.

The Appellant, in response to MPIC's position, stated in its written brief:

19. There is no provision in the legislation which allows the Corporation to reverse a decision regarding entitlement to IRI made nearly 10 years earlier. The Corporation may only make a fresh determination of a claim for compensation if there is new information under the following Section

Corporation may reconsider new information

[171\(1\)](#) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

20. In this case, there was no new information. When the first decision was made the corporation was aware of all of the material facts:

- [the Appellant] had not been employed for years due to her pre-existing disability.
- She had been on CPP disability since October 1991 due to her pre-existing disability.
- She suffered from a heart condition which had lead to causalgia of the right leg.
- She was taking courses at [text deleted] and she was enrolled in a one year [text deleted] program with [text deleted] which was to be spread over two years due to her pre-existing disability.

The Appellant, in further response to MPIC's position, submitted that the Corporation's decision to terminate the IRI benefits, having regard to the provisions of Section 105, was correct.

Both parties requested that the Commission deal with all of the issues raised by both parties with the exception of the correctness of MPIC's decision in respect of the status of the Appellant as a student prior to the motor vehicle accident. However, in view of the decision of the Commission to allow the Appellant's appeal, it will not be necessary, at this time, for the Commission to deal with the Appellant's submissions relating to:

1. *Res Judicata* and Abuse of Process
2. Waiver and Election

Jurisdiction of the Corporation

The Commission agrees with MPIC's submission that it is entitled to increase or decrease a claimant's benefits subject, however, to the specific provisions of the MPIC Act. The Act attempts to balance the rights of MPIC to carry out its statutory obligation to administer the Act and the right of the claimants to receive benefits that they are entitled to as provided in the Act. Section 169(1) of the Act grants MPIC ". . . *exclusive jurisdiction to decide any matter related to compensation under this Part and to review any such decision.*" However, in carrying out its

statutory responsibility to provide compensation to a claimant, MPIC has certain responsibilities to the claimant as provided in Section 150 of the Act which states:

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavor to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Commission finds that Sections 153(1), 171(1) and (2) of the MPIC Act provides flexibility to MPIC in providing benefits to motor vehicle accident victims and, in the appropriate circumstances, under the provisions of the statute, to terminate, modify or increase these benefits.

Section 153(1) of the Act

Corporation may pay indemnity based on application

[153\(1\)](#) The corporation may, after receiving an application for compensation but before making a decision respecting the entitlement of the claimant, pay an indemnity or reimburse an expense that the claimant is or might be entitled to, if the corporation is satisfied that the application is well founded.

The Corporation, pursuant to Section 153(1) of the Act, has the flexibility, prior to making a decision in respect of the entitlement of compensation, to provide an indemnity or reimburse expenses to which the claimant might be entitled if the corporation is satisfied that the application is well founded.

Pursuant to Section 153(1) of the Act there are many occasions when, as a result of an injury sustained in a motor vehicle accident, a claimant may require immediate assistance before MPIC

has had an opportunity of conducting a thorough investigation in order to make a determination as to an entitlement for reimbursement of expenses. In these circumstances the Corporation may pay an indemnity or reimburse expenses without any statutory restrictions. However, MPIC may, after paying compensation to a claimant pursuant to Section 153(1) of the Act and, as a result of its investigation, conclude that the claimant's Application for Compensation is not well founded and in these circumstances MPIC is entitled to terminate or modify the compensation provided to the claimant without any statutory restriction. The Commission notes, however, that once MPIC, after conducting its investigation, has decided that a claimant is entitled to an indemnity or reimbursement of expenses, MPIC is limited by Sections 171(1)&(2) of the Act to modify or terminate a claimant's entitlement to payment of an indemnity or reimbursement of expenses.

New Information – Section 171(1) of the Act

Section 171(1) of the Act states:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The Supreme Court of Canada has addressed the legal standard to be met by an Administrative Tribunal in submitting new evidence.

Mr. Justice McIntyre, in *R. v. Palmer*, [1980] 1 S.C.R.759, sets out the legal standard to be met in order to admit new evidence:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.

- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief.
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (at 775)

The Court further stated that the standard has been relaxed somewhat in relation to Administrative Tribunals.

The Commission notes that the *Concise Oxford English Dictionary* defines “new” and “information” in these terms:

- new:** (adjective) 1 not existing before; made, introduced, or discovered recently or now for the first time.
- information:** (noun) 1 facts or knowledge provided or learned as a result of research or study. (OED, 10th ed., (Oxford University Press, Oxford, 1999))

Webster’s New World College Dictionary define those terms in this way:

- new:** (adjective) 1 never existing before; ... 2 a) existing before but known or discovered for the first time
- information:** (noun) 3 knowledge acquired in any manner, facts, data, learning. (*Webster’s New World College Dictionary*, 4th ed., (IDG Books, Foster City, 2001))

In arriving at its decision in respect of new information, the Commission is required to review:

1. The information that was in possession of MPIC at the time it granted IRI benefits to the Appellant effective July 1, 1996.
2. Whether or not information contained in the CPP report received by MPIC in the year 2000 was new information.
3. If there was new information, whether the Commission is entitled to receive this information having regard to the principles set out in *R v Palmer* (supra).

Information in the possession of MPIC prior to it's determination
on July 14, 1996 to grant IRI benefits to the Appellant

The Commission has reviewed the information in the possession of MPIC between the date of the motor vehicle accident on June 14, 1994 and July 14, 1996 when MPIC granted IRI benefits to the Appellant.

Calendar Year 1994

The case manager met with the Appellant, her mother and sister, on June 28, 1994, two (2) month after the motor vehicle accident and in his report to file he reported the information he obtained from the Appellant, her mother and sister, as well as his own observations, as follows:

1. That the Appellant had a pre-existing heart condition and had on three (3) occasions prior to the motor vehicle accident had heart surgery.
2. As a result of the surgery the Appellant was disabled and was receiving CPP benefits for approximately three (3) years prior to the motor vehicle accident, which had occurred on June 14, 1994.
3. Subsequent to the motor vehicle accident the Appellant had severe headaches which were not getting any better.
4. The Appellant's mother and daughter described the Appellant as being a different person after the motor vehicle accident.
5. The case manager observed that the Appellant seemed half asleep during his interview.
6. He was advised that the Appellant was on Demerol, which could have the effect of slowing her down considerably.
7. The Appellant had been unemployed since her initial heart surgery in 1978.
8. Prior to her heart problems the Appellant had worked for five (5) years with [text

deleted] and had worked as a [text deleted] to that period of time.

9. At the time of the motor vehicle accident on June 14, 1994 the Appellant was in receipt of CPP monthly disability benefits in the amount of \$[text deleted].
10. In respect of the Appellant and members of her family, the case manager stated:

. . . I do not get the impression that these people are claims conscious or out for anything that they are not entitled to or that they are trying to hide anything. [The appellant] has suffered a serious injury and is simply in rough shape right now. (underlining added)

Calendar Year 1995

The Appellant was again interviewed by the case manager on October 25, 1995. In a memo to file the case manager stated that:

1. Prior to the motor vehicle accident the Appellant had a pre-existing heart condition.
2. Prior to the motor vehicle accident the Appellant had registered for a one (1) year, or two (2) term, [text deleted] course at [text deleted].
3. As a result of the motor vehicle accident she was prevented from attending the course in its entirety and was paid student lump sum indemnities of \$6,300 for each term, for a total of \$12,600.
4. The Appellant advised the case manager that her personal physician was [text deleted].
5. The case manager indicated that he intended to obtain from [Appellant's doctor] his recommendations as to the type of extensive reconditioning/strengthening program for the Appellant and a detailed report in respect to the Appellant.
6. On October 31, 1995 the case manager wrote to [Appellant's doctor] requesting a narrative report.

Calendar Year 1996

The Commission notes that the Appellant's case manager, [text deleted], was succeeded by [text deleted]. In a Memo to File dated January 29, 1996, a period of one (1) year and seven (7) months after the motor vehicle accident, [text deleted] reports as to a telephone discussion with the Appellant as follows:

1. He advised the Appellant that based on Section 105 of the Act she was not entitled to any IRI because of her pre-existing disability.
2. He was advised by the Appellant that she had been receiving CPP benefits for her disability since 1990.
3. He was further advised by her attending physician, [text deleted], that he had recently sent a status report to CPP in order for the Appellant to continue to maintain her disability benefits.

In an Inter-departmental Memorandum dated January 31, 1996 the case manager reported a discussion he had with [Appellant's doctor] on January 30, 1996. [Appellant's doctor] confirmed that in respect of the Appellant there was nerve damage to her leg which would not allow her to stand, for which she had been rendered disabled.

The case manager, in his investigation, wrote to [Appellant's cardiologist], on May 28, 1996 requesting information as to the Appellant's heart condition. In response [Appellant's cardiologist], in a letter dated June 4, 1996 stated:

. . . As you probably already know [the Appellant] underwent aortic valvotomy in 1978 and a porcine valve replacement of her aortic valve in 1987. In 1991 she had a mechanical aortic valve placed after a streptococcal endocarditis infection damaged her porcine valve. Since that time she has been stable from a cardiovascular point of view. (underlining added)

[Appellant's doctor] wrote to the case manager on July 21, 1996 and provided a narrative report in respect of the Appellant's motor vehicle accident injuries and stated:

Although she still suffers from causalgia which followed her cardiac surgery, this in itself would not prevent her from carrying out some kind of employment. Her cardiac status is stable at present and I understand that she will be seen in follow-up by [Appellant's cardiologist] in the Fall. (underlining added)

[Appellant's doctor] enclosed in his letter to the case manager a copy of his CPP report dated October 22, 1991, which was in a form provided by CPP and stated:

1. Bacterial endocarditis - 2° to valve prosthesis ((3) below)
2. Anaemia
3. Aortic stenosis
4. CHF (*congestive heart failure*)
5. Causalgia R leg

Under the heading 'Summary and Prognosis' [Appellant's doctor] stated:

Guarded @ present. Her course will have to be followed over the next year by a cardiologist.

[Appellant's doctor] also provided CPP with a report that he had received from [Appellant's heart surgeon], dated June 4, 1991. In his report [Appellant's heart surgeon] describes the heart surgery that the Appellant underwent in respect of the replacement of her aortic valve on April 19, 1991. As a result of the surgery the Appellant was left with causalgia in the right leg which [Appellant's heart surgeon] believes is related to the dissection of the external iliac artery.

MPIC's legal counsel, in her written submission to the Commission provides the following summary of [Appellant's heart surgeon's] report:

According to [Appellant's heart surgeon], [the Appellant's] greatest problems were numbness and weakness in the right foot and leg and a burning sensation in her right foot. The burning sensation in the right foot became more of a problem following discharge

from hospital and was diagnosed as causalgia in the right foot, related to the dissection of the external iliac artery. Within the month she had been seen by the [text deleted] Clinic and was treated with a pharmacological sympathectomy of alcohol which led to an improvement whereby she could now walk but had constant discomfort, difficulty sleeping, emotional lability (sic), depression, burning pain, and hyperesthesia (abnormally exaggerated sensitivity or response to sensory stimuli). . . .

By October 1991, in support of her application for CPP disability benefits, [Appellant's doctor] noted that [the Appellant's] right foot was observed to be reddened and tender to the touch. He listed her prognosis to be guarded at present, to be followed by a cardiologist over the next year. She was prescribed Tylenol #3. . . .

The Commission notes that the case manager was aware that the Appellant had been prescribed pain killers such as Tylenol #3 to deal with her right foot pain caused by the causalgia.

Case Manager's Decision - July 24, 1996

In a memorandum to file dated July 24, 1996 the case manager, upon receipt of [Appellant's doctor's] faxed medical report, determined that the Appellant, despite a pre-existing disability relating to her heart condition together with causalgia, was entitled to receipt of IRI benefits based on the average industrial wage (AIW) effective July 1, 1996 and so advised the Appellant on this date. The Commission notes that the Appellant commenced to receive IRI effective July 1, 1996 until MPIC terminated these benefits in January 2006, approximately nine (9) years and six (6) months later.

Case Manager's Decision dated January 5, 2006

In the case manager's letter to the Appellant on January 5, 2006 the case manager stated that he had reviewed the existing information that MPIC had on file, together with a file that they had obtained from CPP in the month of September 2000. Approximately six (6) years later, after MPIC received the CPP file, a new case manager advised the Appellant that in light of the new information on this file, it was clear that the Appellant was not capable of holding employment at

the time of the accident and, accordingly, she had not been entitled to receipt of IRI benefits pursuant to Section 105 of the Act.

An examination of the material contained in the CPP file, which MPIC received in the year 2000, contained [Appellant's doctor's] 1991 report to CPP, as well as [Appellant's heart surgeon's] report to [Appellant's doctor] dated June 4, 1991, which [Appellant's doctor] had provided to CPP. These specific reports contained in the CPP file were in the possession of the case manager at the time he made his decision to grant IRI benefits to the Appellant on July 24, 1996.

The additional information contained in the CPP file was not in the possession of the case manager in 1996 when he made his decision in respect of IRI, but was received by MPIC in 2000 and included the following documents:

1. CPP Questionnaire completed by the Appellant dated October 22, 1991.
2. CPP Disability Reassessment Questionnaire completed by the Appellant dated December 8, 1993.
3. [Appellant's doctor's] report to CPP dated December 17, 1993.
4. [Appellant's doctor's] report to CPP dated February 14, 1995.
5. [Appellant's anesthetist] report dated May 27, 1998.
6. [Appellant's doctor's] report to CPP dated February 18, 1998.

The Commission finds, upon examination of these reports, that the relevant information contained in these reports is not new within the meaning of Section 171(1) of the Act. As a result, the Commission determines that MPIC was not entitled to make a fresh decision pursuant to Section 171(1) of the Act to terminate the Appellant's IRI benefits in the year 2006.

CPP Questionnaire dated October 21, 1991

A summary of the Appellant's responses to the CPP Questionnaire, as set out in MPIC's written submission to this Commission, states:

Under the CPP Questionnaire (sic) for Disability Benefits, dated October 22, 1991, [the Appellant] (then [text deleted]) stated:

- she had stopped working May 1, 1990 due to sickness, though she indicated she could not work from October 1990;
- her doctor had not told her when she could return to work;
- she was unsure whether or when she could return to work in the future;
- her main disabling condition was recovering from heart surgery and pain in her right leg resulting in her being unable to stand for a long period of time, difficulty sleeping, and on heavy painkillers;
- diagnosed with Reflex Sympathetic Dystrophy Syndrome (complex regional pain syndrome);
- she was unable to stand on her feet for a long period of time without lots of pain and with medication she lay down and rested frequently;
- experienced difficulties sitting, standing, walking, concentrating, and sleeping;
- nerve conduction tests were scheduled for November 1991 (Tab 4, p. 25 – 33).

The Commission finds that an examination of the relevant medical information contained in this Questionnaire is in substance not new or decisive within the meaning of Section 171(1) of the Act which would permit MPIC to review the Appellant's entitlement to IRI benefits in order to terminate these benefits. MPIC was aware that prior to granting her IRI benefits:

1. the Appellant had not worked for several years prior to the motor vehicle accident;
2. she had not been advised by her medical doctors when she could return to work;
3. her causalgia condition caused numbness and weakness to her right foot;
4. this condition was extremely painful and, as a result, she was taking pain killers such as Demerol and Tylenol #3;
5. she was unable to walk, had constant discomfort and difficulty sleeping.

Disability Reassessment Questionnaire dated December 8, 1993

MPIC, in its written submission to the Commission, summarized the Appellant's responses to a CPP Disability Reassessment Questionnaire dated December 8, 1993 as follows:

In a Disability Reassessment Questionnaire, dated Dec. 8, 1993, [the Appellant] still had the same health diagnosis and symptoms:

- her chief complaint was the pain in her right leg, described as burning, hard to walk, shooting pains, and numbness with a difficulty sleeping, diagnosed as RSDS;
- motor vehicle accident (1993) causing headaches for which she had sought chiropractic treatment;
- admitted to the hospital for hemorrhaging, emergency d/c, and blood transfusion from November 16-22, 1993;
- she stated her condition was unchanged;
- she also described consuming 5-6 Tylenol #3 which fogged her judgment. (Tab 4 p. 21-24).

The Commission finds that the information contained in this Questionnaire does not establish new, relevant, decisive information which would have permitted MPIC to conclude that there was new information within the meaning of Section 171(1) of the Act which would justify MPIC making a fresh decision pursuant to this provision to terminate the Appellant's IRI in January 2006.

In reference to the comment in the Questionnaire which indicated the Appellant was consuming Tylenol #3 which fogged her judgment, it should be noted that one (1) month after the motor vehicle accident the case manager met with the Appellant and he observed that she was half asleep during the course of the interview and was informed that she was taking Demerol which appeared to slow her down. It should further be noted that [Appellant's heart surgeon], in his report to [Appellant's doctor] of April 4, 1991, described the intense pain that the Appellant suffered to her right foot and that [Appellant's doctor] had prescribed Tylenol #3's. [Appellant's

heart surgeon's] report had been provided by [Appellant's doctor] to the case manager when he wrote to the case manager on July 21, 1996, four (4) days prior to the case manager determining that the Appellant was entitled to IRI benefits.

In respect of the Questionnaire's reference to the Appellant's emergency admission into hospital in 1993 (or perhaps 1994) for hemorrhaging and the need for blood transfusion, MPIC has not established any causal connection between the Appellant's medical problems relating to hemorrhaging and the need for a blood transfusion and her motor vehicle accident injuries. The Questionnaire further indicated that the Appellant's medical condition had not changed and this is consistent with the medical reports from [Appellant's doctor], [Appellant's cardiologist] and [Appellant's heart surgeon], which were in the possession of MPIC prior to granting IRI benefits to the Appellant. All of these medical reports establish that there was no change in the Appellant's pre-existing disability after the motor vehicle accident.

The Commission notes that in July 1996, when the case manager determined that the Appellant was entitled to receive IRI, he was aware of her pre-existing problems, the post-surgical causalgia, the use of painkillers by the Appellant, and her prolonged incapacity to return to gainful employment. The Commission finds that there is nothing decisive or relevant in the information contained in [Appellant's doctor's] report which could be considered as new within the meaning of Section 171(1) of the Act which would permit MPIC to make a fresh decision to terminate the Appellant's entitlement to IRI benefits.

[Appellant's doctor's] CPP Reassessment Medical Report dated December 17, 1993

MPIC, in its written submission to the Commission, summarized [Appellant's doctor's] report to CPP on December 17, 1993 as follows:

- the diagnoses were post-surgical causalgia of the right foot and open heart surgery;
- the current treatment was Coumadin (anti-coagulant) and Tylenol #3;
- the prognosis was a prolonged incapacity to return to gainful employment;
- her limitations were decreased exercise tolerance secondary to heart condition and pain in right foot due to causalgia; and
- the frequency of visits to [Appellant's doctor] alone were fortnightly (Tab 4, p. 17).

[Appellant's doctor's] prognosis in respect to the Appellant's prolonged incapacity to return to gainful employment changed in 1996. The case manager reports in his Inter-departmental Memorandum dated January 31, 1996, that he had a discussion with [Appellant's doctor] on January 30, 1996 and [Appellant's doctor] confirmed that in respect of the Appellant there was nerve damage to her leg which would not allow her to stand, for which she had been rendered disabled. The Commission notes that [Appellant's doctor] did not state that the Appellant was unable to sit for periods of time.

The Commission further notes that [Appellant's cardiologist] wrote to the case manager on June 4, 1996 and stated that since 1991 the Appellant had been stable from a cardiovascular point of view. [Appellant's doctor], in his report to the case manager on July 21, 1996, no longer was of the view that the Appellant's prognosis was a prolonged incapacity to return to gainful employment. He stated:

Although she still suffers from causalgia which followed her cardiac surgery, this in itself would not prevent her from carrying out some kind of employment.

Four (4) days later the case manager, based on [Appellant's doctor's] report, concluded that the Appellant was capable of returning to work in a sedentary job. The Commission therefore finds

there is nothing decisive or relevant in the information contained in [Appellant's doctor's] report which could be considered as new within the meaning of Section 171(1) of the Act which would permit MPIC to review the Appellant's entitlement to IRI benefits in order to terminate these benefits.

[Appellant's doctor's] Medical Report to CPP dated February 14, 1995

MPIC, in its written submission to the Commission, summarized [Appellant's doctor's] medical report to CPP on February 14, 1995 as follows:

On February 14, 1995, [Appellant's doctor] provided a medical report to CPP indicating [the Appellant] had the same five medical conditions as listed above in 1991. He further indicated that the causalgia of the right leg was still causing her a great deal of pain. This demonstrates that the causalgia had continued unabated since his previous medical report in Dec. 1993. In other words, [Appellant's doctor] neither mentioned that it had improved, nor worsened, but rather, still caused her a great deal of pain.

The Commission finds there is nothing relevant or decisive contained in [Appellant's doctor's] report of February 14, 1995 which constitutes new information within the meaning of Section 171(1) of the Act which would justify MPIC making a fresh decision in order to terminate the entitlement of the Appellant to IRI benefits.

[Appellant's anesthetist's] Report to CPP dated May 27, 1998

MPIC's written submission also summarized a report by [Appellant's anesthetist], [text deleted], and is contained in a report to CPP dated May 27, 1998, and states:

RSDS was explained as neuropathic pain by [Appellant's anesthetist], [text deleted]. She also diagnosed a complex regional pain syndrome, type 1 (note: this is the same as RSFS). When questioned about the prognosis, [Appellant's anesthetist] stated that in general, long standing neuropathic pain is quite difficult to treat. Furthermore, [Appellant's anesthetist] stated that neuropathic pain on its own often severely limits patient's ability to perform any type of physical activities and the severity of the pain also limits one's ability to concentrate on any task.

The information contained in [Appellant's anesthetist's] report was information in the possession of the case manager in 1996 when he determined that the Appellant was entitled to IRI benefits. The case manager, as a result of his investigation, had several discussions with the Appellant in respect of her physical problems, had several discussions with [Appellant's doctor], and had received several medical reports from [Appellant's doctor], [Appellant's cardiologist] and [Appellant's heart surgeon] and had dealt with the relationship between the Appellant's pre-existing disability and her ability to be employed. The case manager was aware, as a result of the Appellant's pre-existing disability, that she suffered constant pain to her right leg and, as a result, was unable to stand for long periods of time. Notwithstanding these limitations, [Appellant's doctor] was of the view that the Appellant could be employed in a job which did not require the Appellant to stand for long periods of time. Based on this information the case manager concluded that the Appellant could be employed in a sedentary occupation. The Commission therefore concludes that there was no new information and/or decisive information in [Appellant's anesthetist's] report to justify MPIC making a fresh decision in order to terminate the Appellant's entitlement to IRI in the year 2006.

[Appellant's doctor's] Report dated February 18, 1998

The CPP file contained a report from [Appellant's doctor] dated February 18, 1998 which stated:

2. Diagnoses:
 1. Bacterial endocarditis second to valve prosthesis (3 open heart surgeries)
 2. Anemia
 3. Aortic stenosis
 4. Congestive heart failure
 5. Causalgia rt leg following cardiac surgery
 6. On long term anti-coagulant therapy
 7. MVA June, 1994 – multiple contusions (forehead, occipital, lower lip, orbits)

8. Abdominal pain not yet diagnosed
9. Diarrhea not yet diagnosed

The Commission notes that the case manager had in his possession, prior to determining the Appellant's entitlement to IRI in July 1996, [Appellant's doctor's] report to CPP in 1991, which outlines the identical diagnosis as follows:

1. Bacterial endocarditis - 2° to valve prosthesis ((3) below)
2. Anaemia
3. Aortic stenosis
4. CHF (*congestive heart failure*)
5. Causalgia R leg

[Appellant's doctor] had reported at length to the case manager as to the motor vehicle accident injuries the Appellant had sustained in June of 1994. MPIC has not established that the reference to abdominal pain and diarrhea in both of [Appellant's doctor's] reports (which had not yet been diagnosed by [Appellant's doctor]), had any causal connection to the Appellant's pre-existing disability or her causalgia condition. The Commission therefore finds that there was no new information contained in [Appellant's doctor's] report dated February 18, 1998 to justify MPIC making a fresh decision to terminate the Appellant's entitlement to IRI benefits in the year 2006, pursuant to Section 171(1) of the Act.

New Information - Conclusion

For the reasons outlined above, the Commission finds that, having regard to the principles set out in *R v Palmer* (supra), MPIC has not established, on a balance of probabilities, that there was new information in the CPP file which MPIC obtained in 2000 that was relevant and/or decisive within the meaning of Section 171(1) of the Act which would justify MPIC making a fresh decision to terminate the Appellant's entitlement to IRI benefits.

Due Diligence

In the alternative, if there was new information available to MPIC within the meaning of Section 171(1) of the Act as a result of examining the CPP file, the Commission finds that MPIC has not established, on a balance of probabilities, that by due diligence it was unable to adduce the new information as of July 24, 1996 when it determined that the Appellant was entitled to IRI benefits.

Mr. Justice McIntyre, in *R. v. Palmer* (supra), in setting out the legal standard to be met in order to admit new evidence stated:

1. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this principle will not be applied as strictly in a criminal case as in civil cases.

Where a victim of a motor vehicle accident applies for compensation from MPIC in respect of motor vehicle accident injuries, MPIC's case manager will conduct an investigation to determine whether or not the victim is entitled to compensation. In carrying out this investigation the case manager has very wide powers under the Act to obtain relevant medical information from the Appellant, her doctor or CPP in order to determine the victim's entitlement. However, in carrying out the investigation in this appeal the case manager failed to exercise the statutory powers available to him to obtain the relevant medical information in a timely fashion.

The relevant sections of the Act which assist MPIC in obtaining the necessary medical information to determine a victim's entitlement to compensation are:

Corporation may refuse or terminate compensation

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

...

(b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;

Medical reports

51 Every duly qualified medical practitioner, chiropractor as defined in *The Chiropractic Act*; dentist as defined in *The Dental Association Act*, and the employees of every hospital as defined in *The Hospitals Act* attending to, diagnosing, treating, or being consulted by any person injured in a motor vehicle accident in Manitoba shall, upon being provided by the corporation with the written consent of the injured person, forthwith furnish to the corporation a report of the injuries, and the diagnosis and treatment thereof, in such form as the corporation may prescribe.

1994

MPIC's case manager's first contact with the Appellant was approximately two (2) weeks after the motor vehicle accident of June 14, 1994. The case manager learned from the Appellant that she had been on CPP disability for about three (3) years as a result of having open heart surgery on three (3) occasions. It does not appear that the case manager at that time, or at any time thereafter, requested the Appellant to provide a written authorization which would permit the case manager to obtain the Appellant's CPP files for the three (3) year period prior to the motor vehicle accident when the Appellant was receiving CPP benefits. As a result, the case manager was never in a position to persuade the Appellant to provide him with the written authorization he required by informing her that a refusal to provide such a written authorization could result in MPIC determining, pursuant to Section 160(b) of the Act that the Appellant would not receive any compensation. If the case manager had exercised these statutory powers in 1994 shortly after the motor vehicle accident, the Appellant, in order to avoid not receiving any compensation from MPIC would have probably decided to provide MPIC with a written authorization. Armed with this written authorization MPIC would have been able to obtain, shortly after the motor vehicle accident occurred, the medical information CPP had in their files in respect of the

Appellant. This lack of action by the case manager demonstrates a lack of due diligence on his part in obtaining the relevant medical information from the CPP file in 1994.

1995

In October of 1995 the case manager wrote to [Appellant's doctor], who had been treating the Appellant (at that time identified as [text deleted]) in respect of her motor vehicle accident injuries, requested a medical report and stated:

As has been previously documented, [the Appellant] is receiving C.P.P. disability benefits, as a result of a pre-existing condition, and we would ask your opinion as to the effect of the pre-existing condition, if any, on [the Appellant's] ability to perform the functions of daily living, versus the effects of any injury related symptoms on said activities such as, housework, or looking after her newborn son.

Finally, we would request that your report provide a prognosis, along with comments relating to any residual impairments in function that [the Appellant] may be left with. Enclosed is an authorization signed by [the Appellant] to allow for the release of the information requested above.

[Appellant's doctor], in his reply dated December 4, 1995, described the motor vehicle accident injuries the Appellant sustained but did not answer any questions that the case manager asked him in respect of the impact of the Appellant's pre-existing medical condition on her ability to perform the functions of daily living. The Commission notes that the information that the case manager desired from [Appellant's doctor], which [Appellant's doctor] did not provide to him at that time, was very important in the determination of the Appellant's entitlement to IRI. As a result, the case manager was never in a position to attempt to persuade [Appellant's doctor] to provide him with the relevant information from the CPP files by informing him that a refusal by him to provide him with this information was contrary to Section 51 of the Act and could result in the case manager filing a complaint with the College of Physicians and Surgeons of Manitoba. It is probable that [Appellant's doctor], in order to avoid such a complaint being filed with the College of Physicians and Surgeons of Manitoba, would have provided the case manager with

the relevant information that he had provided to CPP in respect of the Appellant in 1995.

This lack of action by the case manager again demonstrates that he failed to exercise due diligence in obtaining the Appellant's CPP file information from [Appellant's doctor] in December of 1995.

1996

In a Memorandum to File dated January 29, 1996 the case manager reported that he had requested the Appellant to provide information with respect to her CPP claim for his review and it appeared to the case manager that the Appellant was not co-operating with this request. Again, the case manager, in 1996, failed to exercise due diligence in attempting to obtain the Appellant's CPP file information by failing to exercise the statutory authority under Section 160(b) of the Act. It is probable that if the Appellant had been informed that a refusal to provide the appropriate authorization to the case manager would have resulted in MPIC determining it would not provide any compensation to the Appellant, the Appellant would probably have provided a written authorization to the case manager to obtain the appropriate information from the CPP file in 1996.

Rather than requiring the Appellant to authorize CPP to provide the case manager with the relevant information, the case manager, in his memorandum of January 29, 1996, indicates that he contacted CPP and had a discussion with a CPP representative who informed the case manager that he could not give him any information regarding the Appellant's claim as it was confidential and that such information was available in Ottawa.

When CPP failed to provide the case manager with the relevant information he desired, the case manager could again have approached the Appellant and attempted to persuade her to provide him with the appropriate written authorization, by advising her that her failure to provide him with the written authorization, pursuant to Section 160(b) of the Act, would result in the Appellant not receiving any compensation from MPIC. Again, it is probable, upon receipt of this information, that the Appellant would have provided the appropriate authorization to the case manager to obtain the CPP file in order to prevent MPIC from denying her any compensation. Again, by these actions, the case manager did not demonstrate due diligence in obtaining the relevant information from the CPP file in January 1996.

Instead, the case manager met with [Appellant's doctor] on January 30, 1996 and [Appellant's doctor] agreed, as a result of their discussion, to provide a further medical report and undertook to provide the case manager with some information with respect to CPP. On February 1, 1996 the case manager again wrote to [Appellant's doctor] and, mindful of the fact that the Appellant was receiving CPP benefits for a pre-existing disability, the case manager wished to know what occupations the Appellant was precluded from as a result of a pre-existing condition. The case manager provided [Appellant's doctor] with a copy of the Appellant's written authorization. However, it should be noted that in this letter the case manager did not request [Appellant's doctor] to provide the case manager with the information contained in [Appellant's doctor's] reports to CPP.

[Appellant's doctor] did not provide the case manager with any information in response to the case manager's meeting with [Appellant's doctor] on January 30, 1996, or in respect of the case manager's letter dated February 1, 1996. However, no attempt was made by the case manager, at this time, to persuade [Appellant's doctor] that he was required, by Section 51 of the Act, to

provide him with the relevant information and that upon his refusal to do so the case manager could report this matter to the College of Physicians and Surgeons of Manitoba with the request that the College assist the case manager in obtaining the relevant information. It is probable that [Appellant's doctor], in order to avoid a complaint to the College of Physicians and Surgeons of Manitoba, would have provided the case manager with his CPP reports in February of 1996. Again, the failure of the case manager to proceed in this fashion demonstrates a lack of due diligence on the part of the case manager to obtain the relevant medical information from the CPP file.

The Commission notes that two and one-half (2 ½) months later the case manager wrote to the Appellant on May 17, 1996 advising her that [Appellant's doctor] had not provided him with the objective medical information concerning the Appellant's current limitations which precluded her from continuing her studies or her entering the work force. He further indicated to her that he was going to contact the Appellant's cardiologist to determine what effect, if any, the Appellant's congenital heart condition may have on her employability.

The Commission finds that rather than the case manager exercising his powers under Sections 160 and 51 of the Act to obtain the relevant information from [Appellant's doctor], who had provided medical reports to CPP, or from CPP directly by means of an authorization from the Appellant, the case manager chose to contact the Appellant's cardiologist. Although, having regard to the case manager's investigation, it may have been important to obtain medical information from the Appellant's cardiologist, the case manager demonstrated a lack of due diligence in failing to obtain, in a timely fashion, the relevant information in respect of the Appellant's CPP file directly through the Appellant or from [Appellant's doctor].

The case manager, for the third time, wrote to [Appellant's doctor] in a letter dated June 13, 1996. In this letter the case manager asked [Appellant's doctor] a number of questions including as to whether or not the Appellant's pre-existing heart condition would limit the ability of the Appellant to perform the requirements of a student or an employee in a sedentary occupation.

As well, the case manager attended at [Appellant's doctor's] office on June 13, 1996 and insisted on receiving a copy of [Appellant's doctor's] last report to CPP. In response, [Appellant's doctor] finally, on July 21, 1996, provided the case manager with a copy of his report to CPP dated October 22, 1991 and a copy of [Appellant's heart surgeon's] report dated June 4, 1991. [Appellant's doctor], in his report to CPP dated October 22, 1991, does set out the significant pre-existing disabilities that the Appellant suffered prior to the motor vehicle accident and further indicated that in 1991 his prognosis in respect of the Appellant was guarded. [Appellant's heart surgeon], in his report of June 4, 1991 describes in very specific terms the symptoms of the Appellant's causalgia to her right foot which was a result of the heart surgery.

The Commission notes that it took approximately two (2) years between the motor vehicle accident in the month of June 1994, and the receipt of [Appellant's doctor's] report in July of 1996, for the case manager to learn the relationship between the employment capacity of the Appellant prior to the motor vehicle accident and Section 105 of the Act.

The Commission was advised by MPIC that they obtained the entire CPP file in respect of the Appellant in the year 2000 but did not act upon that information for a period of six (6) years until the month of January 2006 when they informed the Appellant that they were terminating IRI based on new information contained in the CPP file. The Commission never received any explanation from MPIC as to why there was a delay of six (6) years before it acted upon the

information contained in the CPP file that was in MPIC's possession. The delay of six (6) years before acting on the information contained in the Appellant's CPP file again demonstrates a lack of due diligence on the part of MPIC in examining this new information.

One of the prime reasons why due diligence is required is to provide finality to MPIC's decisions in order to protect claimants who are entitled to benefits under the MPIC Act from untimely actions by MPIC which are contrary to the Act and which could adversely affect the claimant's entitlement to these benefits.

The decision of MPIC to terminate the Appellant's benefits is not only contrary to Section 171(2) of the Act, but is also unfair and prejudicial to the Appellant. The Appellant had reasonable grounds to believe that after the expiry of the 60-day period, pursuant to Section 171(2) of the Act, MPIC could not unilaterally change its mind and terminate the Appellant's entitlement to IRI unless it had done so in accordance with the provisions of the Act. In these circumstances the Appellant reasonably believed that she could plan and conduct her daily life on the basis that she would be in receipt of IRI benefits from MPIC and she proceeded in this fashion for a period of approximately ten (10) years.

The decision of MPIC to terminate the Appellant's benefits in the month of January 2006, approximately twelve (12) years after the motor vehicle accident of June 14, 1994, may have caused some prejudice to the Appellant in her ability to defend her position in the month of January 2006 that prior to the motor vehicle accident in the month of June 1994 she was regularly capable of holding employment and was not thereby precluded by Section 105 of the Act from receiving IRI benefits.

If MPIC had made its decision shortly after the occurrence of the motor vehicle accident in the month of June 1994, or after conducting its investigation which it completed in the month of January 1996, that the Appellant was regularly incapable of holding employment prior to the motor vehicle accident, the Appellant could have, at that time, in a timely fashion taken the appropriate steps to prepare a defense in respect of MPIC's termination of her IRI benefits. The Appellant, in 1996, could have obtained medical reports as to her employment capacity not only from her own doctors but could have retained other medical specialists such as orthopaedic surgeons and/or cardiologists and/or physiatrists, etc, in this respect. Reports from medical specialists to support her position two (2) years after the motor vehicle accident would receive greater weight from this Commission than medical reports from specialists ten (10) or twelve (12) years after the motor vehicle accident.

Shortly after the motor vehicle accident in 1994 the Appellant could have obtained a Functional Capacity Analysis to support her position that she was regularly capable of holding employment prior to the motor vehicle accident. Such an analysis could lend support to the Appellant's position that she was regularly capable of holding employment after the motor vehicle accident. However, such an analysis in the year 2006 would have little or no weight to support the Appellant's position since it would be performed ten (10) or twelve (12) years after the motor vehicle accident occurred.

It should further be noted that if MPIC had made a timely decision in respect to the Appellant's entitlement to IRI, the Appellant would have been able to have called witnesses such as family members or teachers from the [text deleted] where the Appellant obtained her Grade 12 equivalency in order to support her position that she was regularly capable of holding employment prior to the motor vehicle accident. However, the effluxion of time may have

adversely affected the ability of witnesses to testify after a lapse of ten (10) or twelve (12) years, or their unavailability either due to death, illness or an inability to locate them.

For these reasons the Commission finds that, prior to permitting the introduction of new information, MPIC is required to establish, on a balance of probabilities, that by due diligence it could not have adduced new information which would have justified MPIC, pursuant to Section 105 of the Act, in concluding that the Appellant was regularly incapable of holding employment before the motor vehicle accident on June 14, 1994 and, as a result, permitted MPIC to terminate the Appellant's IRI in January 2006 and it has failed to do so.

Summary – Due Diligence

1. MPIC was aware, two (2) weeks after the motor vehicle accident in the month of June 1994, the Appellant had three (3) open heart surgery operations and had been receiving CPP Disability Pension for a period of three (3) years prior to the occurrence of the motor vehicle accident.
2. Central in determining whether or not the Appellant was entitled to IRI was the relationship between the employability status of the Appellant prior to the motor vehicle accident and Section 105 of the Act and this information was contained in the Appellant's CPP file.
3. The Appellant's CPP file information could have been available to MPIC shortly after the motor vehicle accident occurred but MPIC failed to exercise their statutory rights under Sections 160 and 51 to obtain that information.

4. A period of two (2) years elapsed before the case manager obtained [Appellant's doctor's] letter of July 21, 1996 which contained his 1991 report to CPP.
5. MPIC had in their possession in the year 2000 the CPP file and neglected to act on this information for a further period of six (6) years until January 2006. MPIC did not provide the Commission with any explanation as to what took them an additional six (6) years to review the information on the CPP file and, based on that information, to terminate the Appellant's IRI benefits.

Decision

The Commission finds that for these reasons MPIC did not comply with the legal principles set out by the Supreme Court of Canada in *R v Palmer* (supra) in respect of due diligence. The Commission further determines that, as a result of the lack of due diligence on the part of MPIC the Appellant was probably prejudiced in defending herself against MPIC's decision to terminate her IRI benefits.

Reconsideration by MPIC pursuant to Section 171(2) of the Act

Section 171(2) of the MPIC Act states:

Claims corporation may reconsider before application for review or appeal

[171\(2\)](#) The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if

- (a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or
- (b) the decision contains an error in writing or calculation, or any other clerical error.

In respect of Section 171(2) of the Act the Commission finds that MPIC was not able on its own motion to reconsider its decision to provide IRI benefits to the Appellant on the grounds of error.

It should be noted that under Section 172 of the Act:

1. a claimant may, within 60 days after receiving notice of a decision by MPIC in respect of an entitlement to apply in writing to MPIC for a review of a decision.
2. MPIC, and/or the Commission, can extend the time for a claimant filing an application for review.
3. MPIC, at any time before the claimant applies for review of the case manager's decision, on its own motion or at the request of the claimant, to reconsider its decision in respect of an error as defined in Section 171(2)(a)&(b) of this section.

Pursuant to Section 172(1) of the Act, MPIC is entitled, prior to the expiry of the 60-day period, or any extension of time, and prior to a claimant applying for a review of a case manager's decision, to reconsider its decision on the grounds of error as described in Section 171(2)(a)&(b) of the Act. However, after the 60-day period has expired, or any extension thereof as permitted by Section 172(2) of the Act, and where a claimant has not applied for a review within the 60-day period or any extension thereof, MPIC does not have the statutory right, under Section 171(2) of the Act, on its own motion to reconsider the decision if in its opinion an error has occurred as described in Sections 171(2)(a)&(b) of the Act. Section 171(2) of the Act sets out clear limits upon MPIC's unilateral right to correct or modify any error it has made in a decision to provide IRI benefits to the Appellant.

In this appeal the evidence establishes that a motor vehicle accident occurred on June 14, 1994 and shortly thereafter the Appellant applied for compensation as a result of injuries sustained in the motor vehicle accident. MPIC conducted an extensive investigation between the date of the motor vehicle accident on June 14, 1994 and July 24, 1996 (a period of twenty-five (25) months) when it determined that the Appellant was entitled to IRI benefits. The investigation included several interviews with the Appellant and [Appellant's doctor], as well as receiving several medical reports from [Appellant's doctor], [Appellant's cardiologist] and [Appellant's heart surgeon].

After MPIC granted the Appellant IRI benefits to commence July 1, 1996, the Appellant did not make an application to have her entitlement reviewed by an Internal Review Officer. As a result, MPIC had an additional sixty (60) days, under Section 172(1) of the Act, to reconsider whether or not it had committed an error in granting IRI benefits to the Appellant. The Commission finds that MPIC had ample opportunity during the twenty-five (25) month period in which it investigated the Appellant's claim to determine whether the Appellant could not regularly hold employment prior to the motor vehicle accident and, as a result, would be precluded by Section 105 of the Act from being in receipt of IRI benefits and failed to do so. The Commission further finds that MPIC also had ample opportunity, during the first sixty (60) days following MPIC's decision to grant IRI benefits to the Appellant effective July 1, 1996 to reconsider its decision to grant the Appellant IRI on the grounds of error and it failed to do so.

MPIC's inordinate and unexplained delay in determining it had erred in respect of the Appellant's entitlement to IRI was compounded by the evidence before the Commission which

revealed that MPIC had possession of the CPP file in the year 2000 and did not act on the material contained in this file for a further period of six (6) years.

The decision by MPIC to terminate the Appellant's IRI benefits in January 2006 on the grounds that it erred, after providing the Appellant with IRI benefits for a period of nine (9) years and four (4) months, unreasonably exceeded the time limits in which it was entitled to review this decision by a period of approximately nine (9) years.

In support of its position that MPIC was entitled to correct the error it made, MPIC in its written submission stated:

If MPI can not correct an error or misclassification that provided a benefit to which there was no entitlement, the corollary must also be true: that MPI can not correct an error to provide a benefit to which there was an entitlement.

It is the Commission's position that MPIC is entitled to correct errors or misclassifications either to provide benefits to a claimant or to modify or terminate benefits to a claimant, but MPIC can only do so in accordance with the specific provisions of the Act. The Commission concludes that when MPIC paid the Appellant an additional \$49,000 in November 2001, it did not do so contrary to the provisions of the Act.

Having regard to Sections 153(1), 171(1) and (2) of the Act, MPIC has sufficient scope to correct errors or misclassifications that may occur during the course of MPIC's administration of the Act. However, the Commission notes that in administering these provisions of the Act MPIC must comply with Section 150 of the Act which states:

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavor to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

Did MPIC make a decision in respect of Section 105 of the Act

MPIC has asserted that no decision was made by the case manager as to whether or not the Appellant, pursuant to Section 105 of the Act, was regularly incapable before the motor vehicle accident of holding employment prior to granting the Appellant IRI benefits on July 1, 1996. Therefore, MPIC submits that although the motor vehicle accident occurred on June 14, 1994, MPIC was free, without any statutory restrictions, twelve (12) years later in January 2006, to determine that the Appellant was regularly incapable, before the motor vehicle accident in June of 1994, of holding employment. As a result, MPIC submits that it was justified in terminating her IRI benefits in the month of January 2006, pursuant to Section 105 of the Act.

In response, the Appellant asserts that the case manager:

1. was aware that, for a period of three (3) years prior to the motor vehicle accident, the Appellant, as a result of a pre-existing disability in respect of a heart condition, had been in receipt of a CPP disability monthly benefit in respect of this disability.
2. was aware that, prior to the motor vehicle accident, the Appellant had decided to return to the work force and, in pursuit of this goal, attended the [text deleted] and had obtained her Grade 12 equivalency and had subsequently registered to take a [text deleted] at [text deleted].
3. was aware that the Appellant was unable, due to her motor vehicle accident injuries, to attend [text deleted] for the two (2) year course and, as a result, MPIC classified the Appellant as a full time student and she received a lump sum indemnity for two (2) years.

4. after conducting an investigation to determine the Appellant's entitlement to IRI benefits, had interviewed, on several occasions, the Appellant and her personal physician, [text deleted], and had received several reports from [Appellant's doctor], [Appellant's cardiologist] and [Appellant's heart surgeon].
5. initially decided that the Appellant was not entitled to receive IRI benefits because she had been regularly incapable of holding employment prior to the motor vehicle accident pursuant to Section 105 of the Act.
6. as a result of this investigation, concluded that the Appellant was capable of being employed in a sedentary occupation despite her pre-existing disability and, as a result, she was not precluded by Section 105 from receiving IRI benefits.
7. effective July 1, 1996, following the end of the Appellant's missed schooling, converted the student indemnity payments to IRI indemnity benefits.

The Appellant further submits that the IRI benefits continued from July 1, 1996 until the end of 2005, a period of nine (9) years and five (5) months, when MPIC misinterpreted and/or misapplied Section 105 of the Act and terminated the IRI benefit.

Discussion

The Appellant, at the end of January 1996, a period of nineteen (19) months after the motor vehicle accident, was interested in knowing what her entitlement would be from MPIC, subsequent completion of her student indemnity payments for the two (2) year period following the motor vehicle accident. In a Memo to File dated January 29, 1996 the case manager reported a telephone discussion he held with the Appellant wherein he responded to her inquiry as to her entitlement from MPIC and states:

. . . I told her at this time that based on the coverages, I cannot see that she is entitled to anything, in view of the fact that she has been determined to be a student, received the lump sum indemnities as required for the year course she was enrolled in at the time of the accident. However, based on Section 105 of the Act, she is definitely not entitled to any IRI, because of her disability at the time of the accident for which she was receiving the CPP benefits. . . (underlining added)

The case manager's comments to the Appellant clearly indicates that he considered the Appellant's entitlement to IRI payments in respect of Section 105 of the Act and concluded, having regard to her pre-existing disability for which she was receiving disability benefit payments from the CPP, that she was not entitled to any IRI payments pursuant to Section 105 of the Act.

The case manager met with the Appellant on January 29, 1996 and in an Inter-departmental Memorandum dated January 31, 1996 the case manager stated:

. . . After we rehashed everything that has gone on with the claim, we went over the pertinent sections in the Act referring to a student receiving lump sum indemnities for current studies, along with entitlement to IRI following completion of current studies. However, in this case, she would be precluded from claiming IRI, due to her pre-existing disability for which she is receiving CPP benefits. (underlining added)

Again, the case manager reiterates his initial decision that in January 1996, following the completion of the two (2) year period in which she would have received a lump sum student indemnity benefit, the Appellant would be precluded from receiving IRI payments due to her pre-existing disability.

The Commission concludes that the case manager clearly indicated to the Appellant that he had on several occasions considered that because of her pre-existing disability she had been regularly

incapable of holding employment prior to the motor vehicle accident and, as a result, precluded from receiving IRI payments pursuant to Section 105 of the MPIC Act.

The Commission further finds, however, that notwithstanding this initial determination by MPIC that she was not entitled to IRI payments, the case manager intended to complete his investigation before providing any recommendation as to the Appellant's entitlement to IRI payments to the MPIC Coverage Committee. The case manager desired, during the course of his investigation, to obtain relevant medical information that was contained in the Appellant's CPP file relating to her disability payment and, as well, obtain the relevant medical information from the Appellant's caregiver before providing a report to the MPIC Coverage Committee in respect of the Appellant's entitlement to IRI benefits.

In the Inter-departmental Memorandum dated January 31, 1996 the case manager reports the following discussion he had with the Appellant:

We went over the medical information in detail. She requested copies of all medical reports on file for her records. . . .

I asked if she would allow the release of all the CPP information on file, and she is hesitant to do so. I pointed out to her that this information may be crucial to her case, and demanded by the Coverage Committee and/or Appeal Commission, should this file go that far.

In any event, we agreed that I would make an appointment to see her attending GP, [Appellant's doctor], and get as much information as I could out of him. Follow-up with a letter to which he may provide a report, hopefully including a treatment plan, and from there I can submit the file to the Coverage Committee.

I advised that upon the return of the file from the Coverage Committee, with their decision, depending upon their decision, she would have the right to appeal through the normal channels. (underlining added)

The case manager met with [Appellant's doctor] on January 30, 1996. In their discussion it appears that the case manager had changed his opinion as to the Appellant's entitlement to IRI benefits. The case manager, rather than rejecting the Appellant's entitlement to IRI due to her disability, is now seeking a way in which to have the Appellant employed in a sedentary occupation.

In an Inter-departmental Memorandum dated January 31, 1996 the case manager reports of his discussion with [Appellant's doctor] as follows:

I also explained the situation with regard to the Catch 22 that has occurred within our coverage, as a result of her ongoing disability through CPP. He confirmed that there is nerve damage in her leg which will not allow her to stand, for which she has been rendered disabled. However, I pointed out that we would be looking at having her be able to work at a very sedentary occupation where a lot of sitting would be involved.

We therefore agreed that I would write to him for a further report, along with his recommendations for treatment and he could give us some information with regard to CPP.

Upon receipt of [Appellant's doctor's] report I will then submit the file for the Coverage Committee review. (underlining added)

This Memorandum demonstrates that the case manager has clearly shifted his position with respect to the Appellant's entitlement to IRI benefits in relation to Section 105 of the Act. The case manager addresses his ambivalence to [Appellant's doctor] by stating that in respect of the Appellant's entitlement to IRI benefits as a 'catch-22'. It appears to the Commission that the case manager was suggesting to [Appellant's doctor] that on the one hand, due to the Appellant's pre-existing disability, she was disabled and, as a result, was in receipt of disability payments under the CPP for several years prior to the motor vehicle accident. However, on the other hand, the case manager seems to be suggesting to [Appellant's doctor] that the Appellant may not have been totally disabled prior to the motor vehicle accident and, therefore, could be employed at a

very sedentary occupation. As a result, it appears that the case manager is now seeking medical information to establish that, prior to the motor vehicle accident, the Appellant was capable of regularly being employed in a very sedentary job and, as a result, the Appellant would be entitled to IRI benefits notwithstanding the provisions of Section 105 of the MPIC Act.

In his discussions with [Appellant's doctor], the case manager appears to take the position that, having regard to [Appellant's doctor's] opinion, the Appellant is not totally disabled from working but would be employable working in a sedentary position where she would not be required to stand and where a lot of sitting would be involved. The case manager, in accepting [Appellant's doctor's] medical opinion as to the Appellant's disability, concluded that although she may be disabled for the purposes of the *Canada Pension Plan Act* and entitled to receive a CPP disability benefit, she was not so disabled, prior to the motor vehicle accident, that she could no longer hold regular employment and, as a result, would not be precluded by Section 105 of receiving IRI benefits.

The Commission finds, having regard to the conduct of the case manager, that in order to avoid the application of Section 105 of the Act, which would preclude the Appellant from receiving IRI benefits, he wished to ascertain from [Appellant's doctor] the medical treatments that would permit the Appellant to return to work, as well as information as to her current limitations in respect of sitting and standing, and the type of occupation that she would be precluded from as a result of her disability. As a result, the case manager wrote to [Appellant's doctor] and stated:

This is pursuant to our meeting of January 30, 1996. We would now appreciate receiving a narrative report with your recommendations as to what form of treatment would benefit [the Appellant], to allow a return to her status as a student, or even entry into the work force at a sedentary occupation. Your report should also include her current limitations with respect to sitting, or standing.

As has been previously documented, [the Appellant] is receiving CPP disability benefits, as a result of a pre-existing condition. Accordingly, we will require your opinion as to the type of occupations that [the Appellant] is precluded from, as a result of said condition for which she continues to receive CPP benefits.

Enclosed is a copy of an Authorization, signed by [the Appellant], to allow for the release of the information requested above. We now look forward to receiving your report, along with your account for same. (underlining added)

The Commission agrees with the following comment made by the Appellant's counsel in his written submission:

7. In the investigation the letters which are written by [Appellant's case manager] to [the Appellant's] physicians are crafted in such a way as to obtain medical opinions which would assist him in determining the s.105 issue and her entitlement to IRI (**Docs 44, 41, 39, 36**). In [Appellant's case manager's] letter dated May 28, 1996 he asks [Appellant's cardiologist] the following (**Doc. 39**):

“...we are writing to you for your opinion as to the precise effect of [the Appellant's] heart condition on her pre-accident status as a student or even an employee in a sedentary occupation. Specifically, we must ask the question as to whether she was regularly incapable of employment prior to the motor vehicle accident?”

8. In his response, [Appellant's cardiologist] advises that since 1991 [the Appellant] had been stable from a cardiovascular point of view. He does not answer the question in respect of the s.105 issue relating to [the Appellant's] disability status prior to the accident and instead refers [Appellant's case manager] to [Appellant's doctor] for that information (**Doc. 38 – June 4, 1998**). (underlining added)

[Appellant's doctor] did not respond to the case manager's letter of February 1, 1996 and, as a result, the case manager met with [Appellant's doctor] on June 13, 1996 and discussed the Appellant's file with him. In a Memo to File, dated June 13, 1996, the case manager reports the following discussion with [Appellant's doctor]:

. . . I pointed out we are depending on him to “make the call” whether any continuing disability is MVA injury related or not. Also I insisted on receiving a copy of his last report to CPP which is maintaining clmt's CPP benefits – I told him just because he's advising them she continues to be disabled due to heart condition, that doesn't necessarily

mean she is incapable of employment. He understands and will call clmt. To have her come in for appt. (underlining added)

The Commission finds that the case manager's comments to [Appellant's doctor] on June 13, 1996 clearly indicates that the case manager:

1. concluded that, notwithstanding the Appellant's pre-existing disability, she was not totally disabled;
2. concluded that the existence of this disability did not necessarily mean that the Appellant was incapable of employment;
3. was seeking medical confirmation from [Appellant's doctor] in support of his position.

Therefore, on the same date as his meeting with [Appellant's doctor], the case manager wrote to [Appellant's doctor] requesting his advice as to whether or not the Appellant could work in a sedentary occupation having regard to her disability. In his letter to [Appellant's doctor] the case manager states:

...

3. Is [the Appellant] presently able to perform the requirements of a student or even an employee in a sedentary occupation? If not, please specify the limitations and their relationship to either the motor vehicle accident injuries or pre-existing heart condition.

...

In response, [Appellant's doctor] wrote to the case manager on July 21, 1996 and provided a narrative report in respect of the Appellant's motor vehicle accident injuries. [Appellant's doctor] further stated:

Although she still suffers from causalgia which followed her cardiac surgery, this in itself would not prevent her from carrying out some kind of employment. Her cardiac status is stable at present . . . (underlining added)

The case manager has finally received a medical opinion from [Appellant's doctor] that, notwithstanding the Appellant's pre-existing disability, this disability would not prevent her from carrying out "some kind of employment". [Appellant's doctor] as well confirms the medical opinion of [Appellant's cardiologist] that the Appellant's cardiac status was stable at present.

MPIC's legal counsel has asserted that the Appellant's disability due to her heart condition, which existed for a period of three (3) years prior to the motor vehicle accident, has continued without any change in this medical condition after the motor vehicle accident. The Commission agrees with this submission and finds that whatever limitations the Appellant had prior to the motor vehicle accident in respect of her pre-existing disability did continue unchanged after the motor vehicle accident occurred. Since [Appellant's doctor], in 1996, advised the case manager the Appellant was "*capable of some kind of employment*" and, having regard to his medical opinion that there had been no change in the status of the Appellant's disability from the commencement of her disability to January 9, 1996, the case manager had a reasonable basis for concluding the Appellant was capable of regular employment for several years prior to the motor vehicle accident.

As a result of the medical reports that the case manager received from [Appellant's cardiologist] and [Appellant's doctor], the case manager now had corroboration from:

1. [Appellant's cardiologist] who opined that since 1991 (a period of three (3) years prior to the motor vehicle accident) the Appellant had been stable from a cardiovascular point of view;

2. [Appellant's doctor] who opined that, notwithstanding the Appellant's pre-existing disability and her causalgia, the Appellant had not been so disabled as to prevent her from holding "*some kind of employment*".

These medical opinions confirm the case manager's view that the Appellant was capable of holding some kind of regular employment, ie a sedentary job, notwithstanding the Appellant's disability for several years prior to the motor vehicle accident and, as a result, Section 105 of the Act did not preclude the Appellant from receiving IRI benefits.

In a Memorandum to File dated July 24, 1996, the case manager, upon receipt of [Appellant's doctor's] faxed medical report, concluded that, as a result of the motor vehicle accident injuries, the Appellant was not, on July 24, 1996, capable of holding "some kind of" employment. However, the case manager also concluded that:

1. the Appellant, notwithstanding her disability could, subject to a conditioning program, be "fit for work" and, as a result, was entitled to receive IRI benefits based on the Average Industrial Wage ('AIW') effective July 1, 1996;
2. MPIC would hire a rehabilitation consultant to oversee the conditioning required to make the Appellant fit for work.

The Commission finds that in order for the case manager to have determined that the Appellant was entitled to IRI benefits the case manager had to decide that Section 105 of the Act had no application to the Appellant. The Commission further finds that if the case manager had concluded that, prior to the motor vehicle accident in June of 1994, the Appellant was regularly incapable of holding employment, he would have decided that the Appellant was not entitled to receipt of IRI benefits effective January 1, 1996 pursuant to Section 105 of the Act. However,

the Commission finds that the case manager decided that the Appellant was capable of holding regular employment prior to the motor vehicle accident and, as a result, he therefore concluded that Section 105 of the Act did not preclude the Appellant from receiving IRI benefits.

The Commission finds that the Appellant has established, on a balance of probabilities, that the case manager had considered and rejected the application of Section 105 of the Act in determining the Appellant's entitlement to IRI benefits effective July 1, 1996. The Commission determined that MPIC, having made the decision to provide IRI benefits to the Appellant on July 1, 1996, continued to provide these benefits without interruption until January 2006, a period of nine (9) years and six (6) months. The Commission notes that MPIC reaffirmed its 1996 decision to provide IRI benefits to the Appellant nearly five (5) years later in November 2001 because at that time it provided an additional lump sum payment of \$[text deleted] to the Appellant when it decided that it had improperly deducted this amount from the previous IRI payments to the Appellant.

Decision

For these reasons the Commission rejects MPIC's submission that no decision had been made by the case manager as to whether or not the Appellant, pursuant to Section 105 of the Act, was regularly incapable, before the motor vehicle accident, of holding employment prior to granting the Appellant IRI benefits on July 24, 1996.

Was MPIC's decision in respect of Section 105 of the Act correct

MPIC submitted that the case manager erred in failing to determine that, pursuant to Section 105 of the Act, the Appellant was regularly incapable of holding employment prior to the motor

vehicle accident and thereby precluding her from receiving IRI. In support of their position MPIC:

1. referred to the limitations that the Appellant suffered as a result of her pre-existing disability, which had been outlined previously in this decision.
2. relied on the decision of the Canada Pension Plan to provide disability benefits to the Appellant commencing approximately three (3) years before the motor vehicle accident.
3. relied on the definition of disability as set out in the Federal Court decision of *Villani v Canada (Attorney General)* (2002) 1 F.C. 130 (C.A.).

The Commission rejects MPIC's submission and concludes that, based on the extensive investigation conducted by the case manager, which included several interviews with the Appellant and her [Appellant's doctor] as well as the medical reports received from [Appellant's doctor], [Appellant's d cardiologist] and [Appellant's heart surgeon], the case manager was correct in his decision in the month of January 1996 that the Appellant was regularly capable of holding employment prior to the motor vehicle accident and, as a result, was not precluded by Section 105 from receiving IRI benefits.

In an Inter-departmental Memorandum dated January 31, 1996, the case manager reported a discussion he had with [Appellant's doctor] on January 30, 1996. [Appellant's doctor] confirmed that in respect of the Appellant there was nerve damage to her leg which would not allow her to stand, and for which she was rendered disabled. [Appellant's doctor] defined the Appellant's disability, having regard to her pre-existing heart condition and causalgia, to be an inability to stand. [Appellant's doctor], in the case manager's report of their discussion, did not define the Appellant's disability to include an inability to sit nor did [Appellant's doctor] state

that as a result of the Appellant's disability, she could not do sedentary work. The Commission finds that it was not unreasonable for the case manager to conclude that, having regard to [Appellant's doctor's] medical opinion, the Appellant was capable of "some kind of employment" in an occupation, such as a sedentary job which did not require the Appellant to stand.

In arriving at his decision the case manager was aware that the Appellant's conduct, prior to the motor vehicle accident, was consistent with [Appellant's doctor's] medical opinion. The case manager knew that prior to the motor vehicle accident the Appellant had completed her high school courses which gave her a Grade 12 equivalency and had registered to take courses at the [text deleted] in order to obtain a [text deleted]. The purpose of the Appellant returning to high school and then registering at the [text deleted] was because she believed that she was capable of returning to work. The Appellant's belief in her capacity to work, notwithstanding her disability, is corroborated by the medical opinions of [Appellant's doctor] and [Appellant's doctor].

The Commission agrees with MPIC's submission that there was no change in the condition in respect of the Appellant's pre-existing disability before and after the motor vehicle accident. [Appellant's doctor] had full knowledge of the Appellant's pre-existing disability, and who had treated the Appellant after the motor vehicle accident, concluded that the Appellant was capable of being employed in 1996 in "some kind of employment" which did not require the Appellant to stand.

The Commission finds that since the medical condition in respect of the Appellant's disability was the same before and after the motor vehicle accident, the case manager was entitled to conclude that:

1. the Appellant had suffered from a disability as a result of a heart condition for several years prior to the motor vehicle accident in 1994.
2. notwithstanding this disability the Appellant was capable of “some kind of employment” which did not involve standing in July of 1996.
3. therefore, the Appellant was capable of “some kind of employment” which did not involve standing for several years prior to the 1994 motor vehicle accident.
4. as a result, Section 105 of the Act did not preclude the Appellant from receiving IRI benefits effective January 1996.

The Commission finds that, based on the medical opinions of [Appellant’s cardiologist] and [Appellant’s doctor], and having regard to the Appellant’s efforts to return to the work force prior to the motor vehicle accident, the case manager was correct in determining that Section 105 of the Act did not preclude the Appellant from receiving IRI benefits.

The only medical evidence in respect of the relationship between the Appellant’s pre-existing disability and her ability to be employed on a regular basis was the evidence of [Appellant’s cardiologist] and [Appellant’s doctor] and there was no medical evidence to the contrary. The Commission finds that upon an examination of all of [Appellant’s doctor’s] medical reports and his discussions with the case manager, as well as an examination of [Appellant’s cardiologist’s] medical report, does not support MPIC’s position that the Appellant was disabled, within the meaning of Section 105 of the Act. The Commission does not find any conflict in the medical opinions of [Appellant’s doctor] and [Appellant’s heart surgeon] as contained in the CPP files with the information the case manager obtained from [Appellant’s doctor] in his discussions with him and the medical reports from [Appellant’s doctor] and [Appellant’s cardiologist]. The Commission further finds that the medical opinions of [Appellant’s doctor] and [Appellant’s

cardiologist] were totally consistent with the decision made by the case manager in the month of July 1996 to provide IRI benefits to the Appellant.

It was open for [Appellant's doctor] to conclude that although the Appellant was disabled within the meaning of the Canada Pension Plan which would permit the Appellant to receive a CPP payment, the Appellant was not so disabled within the meaning of the MPIC Act which would not permit her to receive IRI benefits under the MPIC Act.

In support of their position, MPIC's legal counsel cited the decision of the Federal Court of Appeal in *Villani v Canada (Attorney General)* (2002) 1 F.C. 130 (C.A.), as well a decision of *Leduc, Edward v. Minister of National Health and Welfare*, referred to in the *Villani* decision. These decisions discuss the "real world" approach adopted by CPP to define the meaning of disability under that Act.

MPIC's legal counsel in their written submission to the Commission stated:

The leading case on the test to be applied to determine if a disability is severe is *Villani v Canada (Attorney General)* (2002) 1 F.C. 130 (C.A.). In his decision, Isaac J.A. finds the appropriate approach to determining whether or not a disability is severe is:

"any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider can not be divorced from the particular circumstances of the applicant such as age, educational level, language proficiency and past work and life experience."

This is referred to as the "real world" approach. The real world approach was first adopted in *Leduc, Edward v. Minister of National Health and Welfare*, referred to in *Villani*:

The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well

be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable."

The Commission finds that the criteria as set out in the above-mentioned decisions in defining the meaning of a disability are criteria different from the criteria in defining disability as set out in the definition of "unable to hold employment" in Section 8 of Manitoba Regulation 37/94, which states:

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.

The Commission is not bound by the decisions of the Federal Court of Appeal in respect of the meaning of disability, and in previous Commission decisions has defined the provision "unable to hold employment" having regard to Section 8 of Manitoba Regulation 37/94, see for example [text deleted] (AC-96-26).

The Commission determines that, based on the medical evidence of [Appellant's doctor] and [Appellant's cardiologist], and the case manager's discussions with the Appellant, the case manager was entitled to conclude, consistent with Section 8 of Manitoba Regulation 37/94, that the Appellant was not, due to her disability, entirely or substantially unable to perform the

essential duties of a sedentary job. As a result, the case manager was correct in determining that Section 105 of the Act did not preclude the Appellant from receiving IRI benefits.

For these reasons the Commission concludes that the case manager did not err when he determined that he was not precluded by Section 105 of the Act in granting IRI benefits to the Appellant. As a result the Commission rejects MPIC's submission that MPIC's decision to grant the Appellant IRI benefits in 1996 was in error.

Decision

The Commission, for the reasons outlined herein, rescinds the decision of MPIC's Internal Review Officer dated May 31, 2006 and allows the Appellant's appeal. The Commission directs that the Appellant's IRI benefits be reinstated from the date these benefits were terminated, together with interest.

Dated at Winnipeg this 30th day of November, 2006.

MEL MYERS, Q.C.

NEIL COHEN

PAUL JOHNSTON