

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-06**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Paul Johnston
Ms Jean Moor

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

HEARING DATES: February 2 and 3, 2010 and April 26, 2010

ISSUE(S): Whether the Appellant's benefits were properly terminated pursuant to Section 160(a) of the MPIC Act.

RELEVANT SECTIONS: Sections 160 and 189 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident on January 12, 2006. At the time of the accident, the Appellant was a pedestrian, crossing [text deleted], when she was struck by a truck. As a result of this motor vehicle accident, the Appellant sustained a concussion, a laceration to the back of her head, facial contusions and bruises, bilateral wrist fractures, dizziness, ringing in her ears and multiple soft tissue injuries. Due to the injuries which the Appellant sustained in this accident, she became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act.

At the time of the accident, the Appellant was employed as a hairstylist on a full-time basis. Due to her injuries, the Appellant was unable to return to her employment and thus qualified for income replacement indemnity (“IRI”) benefits.

Throughout the course of her claim with MPIC, the Appellant provided her case manager with updates regarding her injuries and functional abilities. She continued to complain of ongoing pain in her wrists, significant dizziness, light-headedness, vertigo, nausea and tinnitus. On January 12, 2007, the Appellant met with her case manager to update her status. As part of that meeting, the case manager completed a “Claimant’s Reported Level of Function” form, which the Appellant signed. The form reported the Appellant’s function as follows:

- **Walking** – the Appellant indicated that her maximum tolerance for walking was 15 to 30 minutes. She reported feeling nervous to walk too far as she was afraid she might get dizzy and fall.
- **Standing** – the Appellant’s tolerance for standing was reported to be 15 to 30 minutes, although she hadn’t really tried standing for very long.
- **Bending** – the Appellant reported limited bending as her head would feel heavy and dizziness would result.
- **Squatting** – the Appellant indicated that she could partially squat, if she did it slowly, although squatting caused dizziness.
- **Sitting** – the Appellant’s tolerance for sitting was reported to be 15 to 30 minutes limited due to neck pain and her head feeling heavy and tired.
- **Driving/Repetitive Motion** – the Appellant indicated that she had not driven since the motor vehicle accident and had not tried repetitive movements.
- **Twisting** – lumbar twisting had to be performed slowly because of the potential for dizziness.
- **Lifting** – Her tolerance for lifting was 5 to 10 pounds after which her wrists/hands would hurt and give way.
- **Overhead Lifting** – the Appellant reported that she had not tried overhead lifting.
- **Pushing & Pulling** – pushing and pulling was estimated at 0 to 10 pounds, although the Appellant indicated she had not tried such activity. She indicated she could push a chair.
- **Psychological Care** – The Appellant reported depression – a somewhat depressed mood and she couldn’t work. She reported a fear of driving and a fear of becoming dizzy.
- **Dizziness** – The Appellant reported dizziness when looking up/down, head movement, standing, sitting, walking and generally with quick neck movements.

The Appellant also reported that she stayed in most of the time as she was afraid to go out alone for fear she might fall. She advised that friends periodically came over and they might take her out for a while.

Arrangements were made by MPIC's case manager to conduct an investigation into the Appellant's level of activity. That investigation is documented in two [text deleted] reports dated January 31, 2007 and February 27, 2007. The January 31, 2007 report summarizes the surveillance conducted on the Appellant on January 22, 2007 and January 23, 2007. On January 22, 2007, the Appellant was observed being dropped off at the [gym] on [text deleted]. On January 23, 2007, the Appellant was observed leaving her residence at 10:20 a.m. and walking approximately 2.5 km to the [gym] of [text deleted], where she entered the "Members Access" area. The Appellant was then observed leaving the [gym] of [text deleted] at 11:42 a.m. and walking home. On the video surveillance of the Appellant walking to and from the [gym], the Appellant is observed walking outdoors at a brisk pace, in wintry conditions, for the duration of the walk.

On February 16, 2007, the Appellant again met with her case manager to provide an update regarding her status. Once again, during that meeting, the case manager completed a "Claimant's Reported Level of Function" form which the Appellant signed. The form reported the Appellant's level of function as follows:

- **Walking** – the Appellant reported that she was able to walk if someone was with her. She indicated that some days were better than others. As well, she reported that she would rarely go out alone and if she did, this would be for no longer than 5 minutes.
- **Standing** – The Appellant reported that standing was difficult because of dizziness. She noted that her standing tolerance depended on how her head was hurting.
- **Bending** – She reported that she was OK when she bending forward, but it was hard to get back up.
- **Squatting** – The Appellant reported it was easier to squat than to bend.
- **Sitting** – the Appellant reported no difficulty with sitting.

- **Driving** – The Appellant reported that she was unable to drive. She always had someone drive her and she hadn't been able to drive since the accident.
- **Repetitive Motion** – the Appellant reported that repetitive motion had to be done in moderation.
- **Dizziness** – The Appellant reported that looking up was the worst. Also, if she rotated her head too fast or got up too fast, dizziness would result. She also noted that walking was difficult because of dizziness.

The Appellant also reported that she had a constant noise in her head that drove her crazy. She found it hard to be in a noisy place because it was hard to take. With regards to employment, the Appellant noted that she had not been able to work since the accident.

On February 16, 2007, the Appellant also signed a statement which had been typed by the case manager. In that statement, the Appellant advised that:

...As a result of my dizziness I have fallen on a few occasions. I find that I get dizzy more when I look up or when I turn my head to (*sic*) fast or bend my head down. I find it hard to walk because of the dizziness and I don't go out alone for very long because I am scared that I might fall. If I go out alone it is not usually for more than five minutes. Standing is also difficult because of the dizziness and I have to be careful not to get up to (*sic*) fast ... I don't feel that I could return to work because I am unable to stand up for very long, I am not able to hold the blowdryer, scissors, brush or clippers because of the strain and pain in my wrists and they give way, this is primarily because of my right hand. I find that I have become depressed because of the accident. This is because I am unable to go to work, and all the changes in my life. I used to go and visit [text deleted] who lives in [text deleted] and have not been able to go for a year now because of the accident. My whole life routines have changed. I spend my days reading, and staying in the house. I have family and friends who come by and take me to the mall and stuff. I have been unable to drive since the accident, but have not had my license suspended. I unable (*sic*) to attend social functions for very long because the noise disturbs me. I have not seen a psychologist with regards to my depression. Prior to the accident I was able to go to the gym once in awhile when I had free time. I also used to be able to walk to work from my house prior to the accident. I believe the above to be true and correct to the best of my knowledge, signed the 16th of February 2007.

The [text deleted] report dated February 27, 2007 summarizes the surveillance conducted on the Appellant on February 16, 22, and 23, 2007. On February 16, 2007 the Appellant was observed leaving her residence with two males and attending an appointment at the MPIC office in the [text deleted]. The Appellant was then observed returning to her residence after the appointment. On February 22, 2007, the Appellant was observed attending a medical building, a shopping mall and grocery shopping. The video of the Appellant in the grocery store shows the Appellant carrying a purse in her left hand and a basket with the right hand. The Appellant is observed walking through the store and placing meat, eggs, juice and several other items into the basket. The Appellant is then observed at the checkout stand where the items are unloaded from the basket by the Appellant. On February 23, 2007, the Appellant is observed being dropped off at the [gym] of [text deleted] on [text deleted]. The Appellant is later observed leaving the [gym] and walking outdoors approximately 2.5 km back home alone.

A neuropsychological assessment was also arranged for the Appellant on January 12, 2006 with [Appellant's Neuropsychologist] in light of her reports of forgetfulness following her motor vehicle accident. [Appellant's Neuropsychologist] was asked for a diagnosis and prognosis of the Appellant's condition. In his report dated April 30, 2007, [Appellant's Neuropsychologist] responded as follows:

2) "Your specific diagnosis and prognosis of her current condition as it relates to the MVA" [the Appellant] has two diagnoses from DSM-IV. The first is simply "Cognitive Disorder N.O.S.", which is a relatively general category for an individual who has some specific cognitive impairments. Her second diagnosis is "Adjustment Disorder with Depressed Mood", which reflects the fact that on one hand she is discouraged and is not coping well with her symptoms, but on the other hand her mood is not serious enough to be diagnosed with Major Depressive Disorder (since she does not have anhedonia or meet other criteria). In terms of her prognosis, the fact she has relatively brief retrograde amnesia, and post-traumatic amnesia would suggest that her cognitive deficits should be temporary, with an expectation of a gradual resolution (together with the fact that there was no CT scan abnormality apart from (sic) her scalp laceration). Thus most patients would have their cognitive difficulties gradually resolve. However in [the Appellant's] case, her self-confidence is very low, and she

actually feels that she is deteriorating with time, although was not able to provide a specific medical rationale for this. Thus the prognosis for her emotional state will actually depend substantially (sic) on her interpretation of medical advice on her vertigo and her hand function, and whether she is comfortable in accepting this information. As noted, [Appellant's Doctor #1's] appointment with her earlier this month on April 5 of her vertigo will hopefully provide further direction and advice for her. When I had asked her about the results, she did not appear to be clear on the prognosis, treatment, etc. In discussing our results with her, I had emphasized my expectation of continued recovery in her cognitive abilities, and described typical timelines for the patients, etc.

On July 13, 2007, MPIC's case manager wrote to the Appellant to advise her of the termination of her PIPP benefits for knowingly providing MPIC with false or inaccurate information with respect to the extent of her injuries in contravention of Section 160(a) of the MPIC Act. The case manager found that the level of activity demonstrated on the videotape surveillance contradicted the advice and information that the Appellant had provided to MPIC in the two level of function forms and meetings with her case manager. As a result, the case manager terminated the Appellant's entitlement to PIPP benefits in accordance with Section 160(a) of the MPIC Act.

In addition to the termination of the Appellant's entitlement to PIPP benefits, the case manager found that the Appellant was also responsible for reimbursing MPIC for the excess payment of benefits which she received as a result of her failure to notify and provide accurate information regarding her functional ability. The case manager advised that the amount of IRI benefits paid to the Appellant subsequent to February 16, 2007 to which she was not entitled was \$10,705.60. Pursuant to s. 189 of the MPIC Act, the Appellant was required to repay this amount to MPIC.

The Appellant sought an Internal Review of the case manager's decision of July 13, 2007. The Internal Review Decision of March 26, 2008 dismissed the Appellant's Application for Review

and confirmed the case manager's decision. The Internal Review Officer found that the Appellant did knowingly provide false information to MPIC in contravention of Section 160(a) of the MPIC Act. She found the surveillance of the Appellant walking contradicted her reports of January 12 and February 16, 2007 to her case manager of her abilities and how much she left her house. The Internal Review Officer also found that MPIC was entitled to reimbursement for the excess payment of \$10,705.60 pursuant to Section 189(1) of the MPIC Act.

The Appellant has appealed that decision to this Commission. The issues which require determination in this appeal are:

1. Whether the Appellant's benefits were properly terminated pursuant to Section 160(a) of the MPIC Act; and
2. whether MPIC is entitled to reimbursement of the overpayment.

Relevant Legislation:

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

(a) knowingly provides false or inaccurate information to the corporation;

Corporation to be reimbursed for excess payment

[189\(1\)](#) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

Appellant's Submission:

Counsel for the Appellant submits that the Appellant did not provide false or inaccurate information to MPIC. Rather, she contends that the Appellant's statements to MPIC reflect her own perception of her abilities at that time. Counsel for the Appellant maintains that on January 12, 2007, the Appellant reported that she could walk 15 to 30 minutes, although she was nervous to do so. Counsel for the Appellant argues that the walking activity shown on the videotape surveillance falls within this time frame and therefore the Appellant's statements were not false. Consequently, counsel for the Appellant submits that the Appellant did not understate her functional abilities on January 12, 2007.

With regards to the Appellant's signed statement of February 16, 2007, counsel for the Appellant contends that the statement is not complete. She argues that the statement is not verbatim and not an accurate account of the information that was exchanged between the Appellant and the case manager. In support of her position, counsel for the Appellant relies on the Appellant's testimony that she could only go out for 5 minutes if she didn't take her medication. However, with her medication, her tolerance for walking increased since her dizziness was controlled by the drug. She argues that this information was not accurately recorded by the case manager. Further, without a record of the questions posed by the case manager to the Appellant, counsel for the Appellant suggests that it is not possible to determine whether the Appellant accurately answered the case manager's queries.

Counsel for the Appellant also submits that the Appellant had no reason to overstate her disabilities and understate her functional abilities. She maintains that the Appellant had significant medical disabilities and there was no reason to make a false report to MPIC in January and/or February of 2007. The Appellant was still facing considerable medical problems

in January and February of 2007 and there would have been no motive for the Appellant to concoct a picture for her case manager that she was worse in February than in January 2007.

Lastly, counsel for the Appellant submits that MPIC overreacted in terminating the Appellant's benefits on July 13, 2007. Counsel for the Appellant maintains that the penalty imposed by MPIC in this case was too severe. Further, counsel for the Appellant argues that MPIC should not be entitled to retroactive payment from February 16, 2007 until July 2007. She contends that MPIC should not have continued to pay benefits to the Appellant until July 2007, thereby creating the overpayment situation, when they had the surveillance information so much earlier. Rather, counsel for the Appellant argues that at a minimum, the Appellant's benefits should be terminated concurrent with the case manager's decision of July 13, 2007.

MPIC's Submission:

Counsel for MPIC submits that the Internal Review Decision was appropriate in the circumstances of this case and that it should be confirmed. He argues that throughout the claim, the Appellant exaggerated her disabilities so as to prolong her receipt of benefits from MPIC. Counsel for MPIC maintains that the Appellant was consistently under-reporting her abilities so as to remain off work and in receipt of IRI benefits. Counsel for MPIC contends that the videotape surveillance clearly conflicts with the statements provided by the Appellant. Further, he maintains that the statements and the surveillance are so close in time that the only explanation is that the Appellant was providing false and misleading information to MPIC. Counsel for MPIC also asserts that there was no difficulty with the English language demonstrated by the Appellant throughout her dealings with her claim file. Rather, he maintains that this is a further story concocted by the Appellant in an attempt to explain her actions.

Counsel for MPIC contends that the Appellant was untruthful on material issues sufficient to warrant the termination of her benefits.

With respect to the application of Section 189 of the MPIC Act, counsel for MPIC argues that repayment is required in the circumstances of this case. Counsel for MPIC maintains that the video surveillance evidence established that the Appellant knowingly provided MPIC with false information and that she misrepresented her injuries and level of function to the Corporation contrary to Section 160(a) of the MPIC Act. Counsel for MPIC maintains that the Appellant should not be relieved from the overpayment which represents monies that were actually paid to her subsequent to February 16, 2007. According to the case manager's decision of July 13, 2007, it was on that day that the Appellant attended at a meeting with the case manager (requiring the assistance of a male). Her presentation on that day was contrary to the actual level of her activity and function all of which she had knowledge of. Further, counsel for MPIC submits that the Corporation requires a reasonable length of time to receive, process and consider the video evidence. He maintains that effectively the Appellant seeks to be relieved from the overpayment (which she received) on the basis that it was MPIC's fault that it was paid to her. Counsel for MPIC submits that that position is incongruent with the Appellant's position that she did not provide the Corporation with false or inaccurate information and that she was entitled to the benefits. Therefore, counsel for MPIC maintains that MPIC is entitled to reimbursement of the excess payment.

Decision:

Upon a careful review of all of the oral and documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant's PIPP benefits were improperly terminated

pursuant to Section 160(a) of the MPIC Act as of July 13, 2007 and that a suspension of PIPP benefits for a period of three months, from July 13, 2007 to October 12, 2007, shall be substituted for the outright termination of the Appellant's PIPP benefits.

Reasons for Decision:

Section 160(a) of the MPIC Act provides that the Corporation may terminate an indemnity, where a person knowingly provides false or inaccurate information to the Corporation. The Commission finds that the Appellant did knowingly provide false or inaccurate information to the Corporation by virtue of the information she provided to her case managers on the Reported Level of Function forms and in her statements to her case managers on both January 12, 2007 and February 16, 2007.

On January 12, 2007, the Appellant completed and signed a Level of Function form wherein she indicated that she was afraid to walk too far for fear of dizziness and potential for falling. She also indicated that she hadn't tried standing very long. The tolerance for walking and standing was estimated at 15 to 30 minutes by the Appellant. Further, during that meeting with her case manager, the Appellant indicated that she stayed in most of the time as she was afraid to go out alone for fear of falling.

On February 16, 2007, the Appellant completed and signed a second Level of Function Form. On this form she reported that she was only able to walk if someone was with her. The Appellant also advised that she rarely went out alone and if so, it was for no longer than five minutes. The Appellant reported that walking was difficult because of her dizziness. She also indicated that standing was difficult because of the potential for dizziness, which depended on how much her head was hurting. Additionally, on February 16, 2007 the Appellant signed a

statement that she did not go out alone for very long because she was afraid she might fall. The Appellant again stated that if she did go out alone it was usually for no more than five minutes.

In contrast, the videotaped evidence was clearly inconsistent with the Appellant's reported level of function. The videotape surveillance of January 23, 2007 shows the Appellant walking outdoors in wintry conditions at a good pace. The walking is continuous and unassisted. The videotape surveillance of February 23, 2007 again shows the Appellant's behaviour as continuous outdoor walking at a good pace. Undoubtedly, the videotape evidence presents significant differences between the Appellant's self-report and the activity demonstrated during the surveillance. The Commission finds that:

1. the information that the Appellant presented to the case managers was incompatible with her activities as demonstrated on the surveillance; and
2. there is a fundamental inconsistency between the Appellant's reported level of function to the case manager and her observed activities on the videotape surveillance.

The videotaped activity of continuous outdoor walking on two occasions (January 23 and February 23, 2007) is not consistent with the reported level of function on January 12 and February 16, 2007 wherein the Appellant reported nervousness with walking too far and that she would rarely go out alone and, if she did, would do so for no longer than 5 minutes. In these circumstances, the Commission finds that there was false, inaccurate and misleading information provided by the Appellant to MPIC during the meetings of January 12, 2007 and February 16, 2007.

Despite the Commission's finding that there was a contravention of s.160(a) of the MPIC Act, upon a careful consideration of all of the information before it, the Commission finds that a suspension of PIPP benefits for a period of three months, from July 13, 2007 to October 12,

2007, should be substituted for the outright termination of the Appellant's PIPP benefits. The medical documentation confirms that, as a result of the motor vehicle accident the Appellant still has substantial disabilities and has not been able to return to work. [Appellant's Doctor #2], in his report of October 31, 2008 advises that:

In summary, she was involved in a motor vehicle accident on January 12, 2006, during which she was struck by a vehicle while walking as a pedestrian. As a result of the impact of the accident she sustained numerous injuries consisting of concussion, scalp laceration, facial contusions and bruises, and bilateral wrist fractures necessitating casting of her undisplaced left distal radial fracture and closed reduction and subsequent casting of her impacted and dorsally tilted right distal radial fracture. Her progress has been prolonged and protracted and her rate of recovery has been slow. As a result of her head injury and concussion, she has developed sequelae of a peripheral vestibular injury manifesting itself as ongoing and persistent dizziness, vertigo, nausea, tinnitus and post-traumatic headaches. Her prognosis for the future is poor as at the present time approximately 2 ½ years since the date of her accident, she stillas (*sic*) not recovered satisfactorily from these injuries. She is left with a permanent scar measuring 10 cm longitudinally over the top of her scalp as a result of her scalp laceration.

In my opinion, she has been left with a permanent impairment and sequelae from the effects of her motor vehicle accident related injuries involving her peripheral vestibular injury and resultant benign paroxysmal positional vertigo secondary to her head injury and concussion. In addition, her hearing loss and tinnitus are also related to her head injury and concussion from her accident, in my opinion, and are not expected to improve now that 2 ½ years have passed.

...

In my opinion, she continues to require treatment and therapies for her peripheral vestibular injury and benign paroxysmal positional vertigo as a result of her head injury and concussion sustained in her accident. This treatment consists of pharmacotherapy on as-needed basis either with Bonamine 25 mg t.i.d., Serc 16 mg q.i.d. or Gravol 50 mg q.i.d. as well as vestibular exercises she has been instructed to perform at home.

In my opinion, she continues to be unable to perform the duties of her regular job as a hairdresser as a result of the injuries sustained in her motor vehicle accident and is permanently and totally disabled by her vestibular injury from performing her job duties as a hairdresser.

While we find that the Appellant was exaggerating and embellishing her difficulties during her reports to her case manager, we find that she was still undergoing substantial difficulties related to her motor vehicle accident at that time. In these circumstances, it would have been more appropriate for this Appellant's rehabilitation for the case manager to have enrolled the Appellant in a formal rehabilitation program rather than instituting an outright termination of her PIPP benefits. Pursuant to Section 150 of the MPIC Act, MPIC has an obligation to advise and assist claimants. Instead of terminating the Appellant's PIPP benefits, the case manager should have assisted the Appellant. Upon learning that the Appellant was indeed attending a gym, the case manager could have enrolled the Appellant in a formal rehabilitation program in order to support the Appellant's reintegration into society. The Commission therefore finds that a suspension of benefits would have been a more appropriate consequence in the circumstances of this case.

In light of our decision, the Commission therefore finds that the Appellant did not receive an overpayment of IRI benefits from February 16, 2007 until July 13, 2007. Pursuant to the provisions of Section 189(1) of the MPIC Act, the Appellant did not receive a benefit to which she was not entitled and therefore MPIC is not entitled to reimbursement from the Appellant for any IRI benefits. Rather, the Appellant's PIPP benefits shall be reinstated effective October 13, 2007 until such time as her entitlement to PIPP benefits is terminated or suspended in accordance with the provisions of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review Decision dated March 26, 2008 is therefore rescinded.

Dated at Winnipeg this 21st day of July, 2010.

YVONNE TAVARES

PAUL JOHNSTON

JEAN MOOR