

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-06**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnston
Mr. Guy Joubert

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
The Appellant was assisted by Interpreters, [text deleted] and [text deleted].
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATES: December 7 and 8, 2010 and March 10, 2011

ISSUE(S): 1. Whether the Appellant's Personal Injury Protection Plan benefits were correctly terminated.
2. Whether the Appellant is responsible for reimbursing MPIC for monies to which he is not entitled.

RELEVANT SECTIONS: Sections 160(a) and 189(1) 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 was injured in a motor vehicle accident on April 27, 2007 when he was a pedestrian struck by a motor vehicle. As a result of the motor vehicle accident, the Appellant sustained several injuries including a fractured right patella, fractured right pelvis, multiple contusions and lacerations, and soft tissue injuries to his neck and back. He was hospitalized for approximately two months and upon his release continued with treatment and received MPIC funded Personal Care Assistance and Income Replacement Indemnity ("IRI") benefits.

The Appellant underwent an independent medical examination with [Independent Psychiatrist] and a psychological assessment was conducted by [Appellant's Psychologist]. He underwent a five week reconditioning program at [Rehabilitation (Rehab) Clinic] which included both physical rehabilitation treatment and psychological treatment and assessment.

MPIC also conducted videotape surveillance of the Appellant in his community setting and [MPIC's Doctor], a medical consultant with MPIC's Health Care Services Team, reviewed video footage.

On June 19, 2008, the Appellant's case manager wrote to him indicating that:

'An investigation of your activities outside a clinical setting demonstrates our observed functional ability contradicts what you have reported or presented to MPI and your caregivers. Such inaccurate presentation from you contravenes section 160(a) of *The Manitoba Public Insurance Corporation Act* (the Act), which says:

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;

The Appellant's case manager reviewed the claims which the Appellant had consistently maintained regarding mental and physical damage as a result of the motor vehicle accident, including:

"...You indicate that you cannot go outside, you cannot sleep well, and that you take Handi-Helper to your appointments. Relying on your information MPI provided various benefits, including providing Personal Care Assistance (PCA)...

...You indicated that you still cannot take a bus as you are too scared, because of your depression and scared of being killed."

This was compared with the Appellant's Level of Function form completed by him and with the activities portrayed on the video surveillance, both in the community and during his rehabilitation sessions at [Rehab Clinic]. The case manager concluded that:

“The above examples demonstrate a level of function clearly contrary to the advice and information that you have provided to MPI and your caregivers and, accordingly, your entitlement to PIPP benefits has been terminated in accordance with section 160(a) of the *Act*, effective November 5, 2007, the first day you were observed outside a clinical setting.”

The Appellant's case manager also noted that his failure to advise MPIC of changes in his circumstances which would affect his entitlement to benefits contravened Section 149 of the Act and that he was responsible for reimbursing MPIC for the excess payment of benefits he received as a result of this failure to notify, pursuant to Section 189(1) of the Act.

The Appellant sought an Internal Review of this decision. On December 9, 2008, an Internal Review Officer for MPIC reviewed the Appellant's file and upheld the case manager's decision.

The Internal Review Officer noted:

“Video surveillance of [the Appellant] undertaken in November, 2007 and January, 2008, shows him functioning at a much higher level than what he informed his case manager he was capable of. Information received from [Rehab Clinic] also indicates that [the Appellant] was intentionally not participating to his actual capability.

[Independent Psychiatrist] who examined [the Appellant] on November 5, 2007, is of the opinion that he could progress to his prior employment duties as a [text deleted] Clerk without the need for any specific restrictions.

In reviewing the video surveillance, I agree with [Rehab Clinic's Doctor's] opinion that there is no medical reason that would reasonably explain the inconsistencies in the physical behaviour [the Appellant] demonstrates, and it would appear quite possible that secondary gain issues are the primary reason for the variable physical abilities and dramatic disability in the clinical settings. I also agree with [MPIC's Doctor's] opinion that [the Appellant] demonstrated a higher functional level when not in a clinical setting than he does when in a clinical setting.”

The Internal Review Officer concluded that the application of Section 160(a) and 189(1) of the Act was justified in the termination of the Appellant's Personal Injury Protection Plan ("PIPP") benefits, including Income Replacement and the recovery of PIPP benefits to which he was not entitled.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

At the appeal hearing the Commission heard evidence from the Appellant's sister and brother and from the Appellant himself. The panel was also shown excerpts from videotape surveillance of the Appellant and the Appellant was asked to comment upon several of these excerpts during both his direct testimony and cross examination.

The Appellant's sister described the Appellant's life before and after the motor vehicle accident. She explained that although he had been living with friends and attending school before the accident, following the motor vehicle accident, he was hospitalized for two months and then came to live with her family. Before the motor vehicle accident he had been outgoing with lots of friends and had been a hard worker, working full-time at [text deleted] and in receipt of commendation letters from that employer. He was a good worker and a happy person who liked to play soccer.

She explained that after the motor vehicle accident he was not the same person. He was depressed and very quiet, stayed in the washroom for long periods of time and took long showers. He was not happy and was in pain, sitting in one place and worrying, without seeing his friends. She also described the financial problems he suffered when his IRI was discontinued

as well as his difficulty getting around, using crutches and then a cane. He cannot take care of himself properly and still goes to see a psychologist for treatment.

The Appellant's brother testified that after the motor vehicle accident he went to live with his brother, in order to help him. He assisted him with cooking and taking him places when he had to go out. He explained that for a while he was paid to help his brother with cooking, laundry, shopping, etc., by MPI. However, he still helps him even though he is no longer paid for it.

He explained that his brother still does not have the strength to work, requires a lot of care and is struggling to get back to where he was.

The Appellant testified that he had graduated from [text deleted] in Canada and worked at [text deleted], which involved full-time hours, standing, and the requirement to lift about 30 pounds. He had an apartment and friends and participated in a variety of activities. He explained that, after the motor vehicle accident, he suffered from nightmares and trauma and did not want to be around any of his friends. He was lonely and depressed and no longer able to work full-time, go to school, play soccer or go out with his friends, as he had before the accident.

The Appellant described his physical injuries in the motor vehicle accident and the difficult recovery he had in hospital and when he was discharged from hospital, using a wheelchair, then crutches and now a cane. He required personal care assistance and attended for physiotherapy.

He also described his rehabilitation treatment at [Rehab Clinic] and the difficulties he had there. For example, he explained that there was no elevator in the [Rehab Clinic] building and that he had to use 20 stairs (with his crutches and staff assisting him) to go up to do his rehabilitation treatment. He stated that by the time he had finished climbing the stairs, he was so tired and stiff that he had difficulty doing his exercises.

The Appellant explained that when he had to go to [Rehab Clinic] in the morning, he would be very stiff and the stairs would be very difficult for him. He would have preferred to go to [Rehab Clinic] in the afternoon.

The Appellant also explained videotaped surveillance showing him taking buses and walking on the streets. He explained that at that time his mother was in the hospital [text deleted] about three months after his motor vehicle accident. He testified that it was very hard to go out, because of his own pain and his mental state, but he needed to visit his mother in the hospital, and so, although afraid of taking the bus and crossing busy streets, he had to do so.

He described his treatment with the psychologist in the hospital and afterwards, and the medications which he used for depression.

The Appellant also described difficulties that he had in speaking with his case manager. In particular, he had difficulty with some of the questions she asked him, which he felt were of a very personal nature. He also explained that she often did not provide a translator when speaking with him or with his brother, and both found this difficult, as they required assistance with English.

The Appellant testified that he may have told his case manager that he could not take a bus. He explained that this was a misunderstanding, due to his difficulty with the English language; he was trying to tell her that he had a fear of taking buses and crossing busy streets.

The Appellant reviewed excerpts from videotape surveillance with the panel. Some of the videotape evidence was taken in the community, while he was crossing streets, attending at libraries, getting onto buses, going into stores, etc. Some of the videotape surveillance occurred in the hospital when he had gone to visit his mother. Some of the videotapes showed him working with therapists at [Rehab Clinic].

The Appellant explained that when out in the community, crossing streets and boarding buses, he had a great deal of fear and anxiety. He could only sit for about 45 minutes to an hour and stand for 15 to 20 minutes. His hands were tired from using the crutches. He described the difficulties he had with the resistance bikes and treadmills at [Rehab Clinic]. He reiterated that his anxiety was very high at that time and he would take pain medication containing codeine in order to go to the exercise sessions. He was tired and moving slowly after climbing the 20 stairs to get up to the [Rehab Clinic] premises. He had difficulty manoeuvring to get on to the exercise equipment and found the workouts to be painful and tiring.

The Appellant also described an incident with his case manager which distressed him. This occurred when he was receiving physiotherapy.

The Appellant explained that there had been a difficulty with the ringer on his phone and so he had difficulty meeting with his case manager, [text deleted]. As a result, during a visit to [text deleted] Physiotherapy on October 18, 2007, she arrived at their premises while he was in the

waiting room. He had a discussion with [Appellant's Case Manager] about personal care assistance forms and an appointment with [Independent Physiatrist] before he was called in for his physiotherapy appointment.

During the treatment the physiotherapist inserted acupuncture needles. He said that the needles were placed in his groin area and he was lying on his back, with his pants half down and covered with a cloth. He said that [Appellant's Case Manager] then walked into the treatment room, without his permission, and sat down. She asked him about his fractures and they discussed his pain, while the acupuncture treatment continued and the therapist stepped out to deal with other patients.

The Appellant took exception to his case manager entering the treatment room to interview him while he was in such a vulnerable and exposed position.

The Appellant also took exception to MPIC conducting video surveillance of him in the hospital when he was visiting his mother, and expressed concerns for the privacy of his mother, who was in a vulnerable, exposed condition in her hospital room.

Counsel for the Appellant submitted that the Commission should overturn MPIC's decision to terminate the Appellant's IRI benefits and to requirement (sic) repayment of benefits received. Counsel submitted that both of these actions by MPIC resulted in an error of law and an abuse of the case manager's discretion. Further, counsel questioned why MPIC was asking for repayment of IRI benefits from November 5, 2007 and queried what had happened on November 5th to trigger this action.

In this regard, counsel noted that, for example, the date of the Appellant's independent medical examination with [Independent Physiatrist] was November 15, 2007, and [Independent Physiatrist] was not of the opinion, at that time, that the Appellant was able to work. He stated:

“The claimant appears to be partially disabled from performing his occupation as a cashier. My expectation would be that with remobilizing and reactivation through the reconditioning program, he should progress to a return to his prior work duties as a [text deleted] at the [text deleted] without any need for any restrictions. I would expect that the claimant would be able to progress to a return to his pre-accident occupation.”

Counsel submitted that since the Appellant was still disabled from his occupation as a [text deleted] on that date, he should not be expected to return IRI benefits he had received for that period. Counsel submitted that while Section 160 of the MPIC Act may provide MPIC with the authority to refuse to pay benefits in the future as a result of receiving false information, demanding repayment is different and is governed by Section 189 of the MPIC Act. While MPIC may take the position that Section 160 applies from June 19, 2008, he submitted that there was nothing to show that on November 5, 2007, the Appellant should not have been entitled to receive IRI benefits.

Counsel submitted that even to this day, there is no evidence that the Appellant is able to return to work, and that he could not be retroactively disentitled to IRI benefits between November 5, 2007 and June 19, 2008.

Counsel also submitted that it was an abuse of MPIC's discretion to require someone such as the Appellant, who was living in poverty, to repay \$12,000 in IRI benefits. He submitted that this was a punitive action and was not the intent of the legislation when it was drafted.

In regard to the application of Section 160 to the Appellant's appeal, counsel for MPIC pointed out several difficulties with MPIC's position.

He noted that the Appellant's English was very poor and that MPIC had never offered him sufficient opportunity to use a translator in his communications with them. The Appellant spoke to his case manager in broken English and his remarks were very basic. In spite of this, he had to explain to his case manager his somewhat complex fear of using buses and being in traffic. Counsel submitted that had the Appellant been given the opportunity to speak in [text deleted], he could have explained that while he was afraid of buses and using them was damaging to his mental health, because of the necessity to visit his mother or attend medical and other appointments, he "sucked up his courage" and went out and did the things he had to do.

Counsel submitted that if the case manager had suspicions, she should have employed a translator to make sure she understood the connection between the Appellant's major anxiety and post-traumatic stress syndrome and the activities he was or was not able to do.

In addition to his poor English skills, counsel noted the Appellant's psychological difficulties of post-traumatic stress disorder, depression and a pain disorder. There is no record of these conditions having pre-dated the motor vehicle accident and we are left to conclude, he submitted, that they were caused by the motor vehicle accident. In addition to the physical damage of the accident, the Appellant was also left with several serious mental disorders. Counsel argued that the differences between the way the Appellant presents to an observer and describes his symptoms and between what he hopes he could do and does can be explained by his mental disorders, his poor use of English, his anxiety and his distrust of medical and other professionals.

Just because these conditions might “turn people off”, they are not a reason to cut the Appellant off from his benefits.

Counsel submitted that the Appellant’s mind and body were devastated by the accident and that needs to be treated with respect. He is still unable to work and still suffers from both the mental and physical effects of the accident, remaining deeply damaged.

Counsel submitted that the Appellant did not knowingly give false information. His evidence regarding how exhausted he was while at [Rehab Clinic], and his mental condition, explain his behaviour in that setting.

Counsel pointed further to the psychological assessments on the file which mention not only the significant English language difficulties which impaired the Appellant’s interviews with his psychological caregivers, but also showed his anxiety and acute distress. This is consistent, he submitted, with the Appellant’s sister’s description of the Appellant’s difficulties. While MPIC believed that the Appellant was knowingly providing false information, the evidence from the Appellant’s family and psychological caregivers said he was mentally and emotionally devastated by what had happened to him. He was hopelessly depressed, anxious and traumatized and should not have been dealt with in the way which MPIC dealt with him. MPIC did not accommodate any of this by having a culturally sensitive person or interpreter present to assist in the interactions with the Appellant.

Counsel pointed to a chiropractic report from March 2008 from [text deleted], the Appellant's chiropractor, which showed that he was still suffering adverse effects from the motor vehicle accident, could not perform the tasks required by his employment and was not near pre-injury status.

Clearly, the Appellant has proven that he still needed help when MPIC cut him off, leaving his life in a shambles.

There was no evidence that the Appellant could work at any time and as such, he should not have been cut off of his IRI benefits or required to repay any benefits. His benefits should be restored and his debt to MPIC wiped out.

Evidence and Submission for MPIC:

In addition to medical reports from [Rehab Clinic], the Appellant's caregivers and MPIC's Health Care Consultants, MPIC produced oral evidence from one of the Appellant's physiotherapists, [text deleted], at the hearing into the Appellant's appeal.

[Appellant's Physiotherapist] testified regarding her experience as a physiotherapist and her treatment of the Appellant, using soft tissue release, mobile manual therapy, range of motion exercises, heat, electro-therapy and acupuncture for pain control.

She described the events which occurred surrounding the Appellant's physiotherapy appointment at her office on October 18, 2007. She testified that although she was not expecting [Appellant's Case Manager] on that day, the front desk notified her that she was in the waiting room. When [Appellant's Physiotherapist] spoke with [Appellant's Case Manager], she was advised that the

Appellant was a new case for her, that she had been unable to reach him by phone and wanted to have a face to face conversation with him. She asked the physiotherapist if it was OK to come in the treatment room.

[Appellant's Physiotherapist] replied that it was OK with her, but that she would have to ask the Appellant. She testified that she asked the Appellant if it was OK with him if the case manager came into the treatment room and he replied yes. The Appellant was wearing loose sweat pants and a t-shirt at that time, working on some bed exercises. These exercises included a heel slide, ball slide, wobble board work and some pushing exercises.

The acupuncture was done in the same treatment room as the exercises. The Appellant was on the table with the curtain closed. He was lying on his side with a pillow between his knees and [Appellant's Physiotherapist] described the location of the needles. She indicated that the Appellant was lying on his left side facing the wall in the treatment room, that he was covered and that no private parts were exposed.

[Appellant's Physiotherapist] testified that the Appellant was not fully exposed and that he did not mention any concern in that regard to her.

While [Appellant's Case Manager] was in the room, [Appellant's Physiotherapist] did leave the room to attend to other clients for about 5 minutes.

When she came back into the room, the Appellant was in the same position. She removed the needles. The Appellant left the room and headed to the front of the office to leave the clinic and [Appellant's Physiotherapist] spoke privately with [Appellant's Case Manager], discussing a

possible appointment for the Appellant with [Independent Physiatrist] and what to do to move forward. She then went to attend to other clients and [Appellant's Case Manager] left the clinic.

[Appellant's Physiotherapist] also indicated that the only need for the case manager to be in the room that day was to discuss the Appellant's future plans with him and that this could have taken place at another time, not during the acupuncture treatment. She also noted that at the time she asked permission for the case manager to be in the room, the Appellant was fully clothed. She indicated that she did adjust his clothes, in order to perform the treatment, in a way which would avoid exposing him. She did however admit that it was possible that the Appellant might have felt uncomfortable, but that her charts indicated that the Appellant was rolled over on his side, facing away from [Appellant's Case Manager].

The Commission permitted counsel for the Appellant to conduct a brief re-examination of the Appellant on the narrow point of the configuration of the treatment room. The Appellant took the position, on questioning from his counsel, counsel for MPIC and the panel, that due to the way the room was configured, his case manager was seated on a chair in front of him. He was facing her and not the wall, according to his evidence.

Counsel for MPIC submitted that the issue was whether the Appellant's benefits had been properly terminated in June of 2008 because he had provided false information to MPIC.

Counsel submitted that the overwhelming evidence before the panel showed that the Appellant had not been truthful. He had not been honest regarding his ability to ride buses. Surveillance video showed the Appellant riding and transferring on buses numerous times. Documents on the file showed that in December 2007 the Appellant told his case manager that he was not ready to

ride buses because of his fear and could not even try to get on a bus. In January and February of 2008 he reported a similar level of function regarding his ability to ride the bus, both in the completion of a level of function form and to [Rehab Clinic]. The case manager's notes indicated that the Appellant had said that he was afraid of buses, but then in cross-examination, he had denied telling his case manager this.

Video surveillance also showed the Appellant able to walk for approximately 25 minutes at a time, at fast speeds. This is in contrast with the information he gave to MPIC and his caregivers that he could walk for only 10 minutes. Further, videotapes showed he walks very slowly when he is going to physiotherapy or to meetings at MPIC, particularly when compared with how fast he walks when going to the hospital to visit his mother, etc.

Counsel also pointed to the difficulty which the Appellant displayed upon the videotape in just climbing onto a stationary bike. [MPIC's Doctor], who reviewed this tape, noted that the Appellant even needed help with his left leg to get on the bike, although there was no documented injury to that leg.

The Appellant's explanation was that sometimes he was feeling better and at other times he was stiff from sitting in the car, etc. This did not explain why the Appellant was able to walk at regular speed on some days and not on others.

Further, the Appellant had not been honest about his fear of buses and traffic and avoiding vehicles. The level of function he reported was not consistent with his abilities and the abilities he displayed in the clinical setting showed much less capability, inconsistent with the abilities he displayed when on his own in the community.

Counsel for MPIC pointed to numerous inconsistencies between the Appellant's reporting and his actual capabilities as evidenced by the videotape surveillance. He submitted that the Appellant showed a pattern of dishonesty regarding his functioning so that his true abilities had not been correctly assessed. This rendered the entire rehabilitation process futile, due to this lack of candidness. As well, other ramifications resulted from the Appellant's misrepresentation; arguably, the Appellant did not need MPIC to pay Handi-Transit and personal care assistance costs when he was capable of doing these things on his own.

The Appellant's case manager and many caregivers had red-flagged his lack of honesty in various areas. Counsel queried, for example, the Appellant's failure to mention that he had a brother who was providing personal care assistance until January 10, 2008 when meeting with the case manager who noticed the similarity in the two brothers' last names.

Psychological reports also noted concerns with possible secondary gain on the part of the Appellant, as did the evidence of the physiotherapists.

No confirmation was provided that the Appellant's mental difficulties coupled with difficulties with the English language explain all of his inconsistent behaviour and statements.

In addition, the Appellant's testimony regarding what occurred with the case manager at the physiotherapy offices was inconsistent with the credible evidence provided by the physiotherapist.

His statements to his caregivers and at the hearing were simply not credible.

Counsel submitted that despite the Appellant's ongoing health and psychological issues, the Appellant did provide false and misleading information, and as a result, his benefits were properly terminated pursuant to Section 160 of the MPIC Act. Counsel further submitted that, under the MPIC Act, when an individual is found to have provided false or inaccurate information under Section 160, the date that such information is discovered is the date upon which the Appellant becomes disentitled to those benefits. That is the date that MPIC used to calculate the Appellant's obligation for reimbursement under Section 189 of the Act. The requirement is to reimburse MPIC once it is found that there was a disentanglement, from the date the Appellant provided the false information.

Counsel submitted that the panel should find that the Appellant had provided false and inaccurate information under Section 160 of the Act and that as a result, his benefits were properly terminated. As well, as a result, the Appellant should be required, pursuant to Section 189 of the Act to repay the benefits he had wrongly received, effective November 5, 2007. Counsel submitted that the Internal Review Decision should be upheld and the Appellant's appeal dismissed.

Discussion:

The MPIC Act provides that:

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.

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer was not correct. The panel has reviewed the documentary evidence on the file, the oral testimony presented at the hearing and the submissions of counsel.

The panel recognizes that the Appellant has difficulty with the English language. We also recognize that he has had ongoing mental health issues arising out of the motor vehicle accident.

The panel finds that the Appellant did not have a good relationship with his case manager and that a part of this was due to the actions and behaviours of the case manager. She failed to obtain interpretation services so that she could be sure she was understanding the Appellant, as would have been the prudent thing to do. The case manager also failed to recognize, appreciate and accommodate the cultural sensitivities of the Appellant and his mental health status.

The Commission also has concerns regarding the video surveillance. We find that some of this was overly intrusive. In particular, the Commission questions the appropriateness of following the Appellant into the [Hospital] to videotape him and his family in and around his mother's hospital room, hospital ward or in that environment or situation in general.

As a result, the panel has given no weight to this evidence and notes that MPIC may wish to consider reviewing its procedures regarding the level of intrusion of its surveillance, in order to

guard against invading the privacy of claimants and/or their families in this manner.

In addition, the Commission finds that the interview which the case manager conducted with the Appellant, while he was receiving acupuncture treatments in a physiotherapy treatment room, was unnecessary and inappropriate.

Although the physiotherapist testified that the Appellant gave a general authorization or permission for this to occur, the Appellant denies giving this permission and the Commission is not convinced that any such permission, even if given, was fully informed, or that the Appellant had any idea that the case manager and physiotherapist intended to allow the case manager to sit with him and question him throughout his entire treatment, which included acupuncture, and at least some degree of disrobing on the part of the Appellant.

The Appellant in that situation was in a vulnerable position, in the presence of perceived figures of authority in the form of his case manager and caregiver, who both should have appreciated the discomfort that anyone might have felt if questioned and interviewed in such an environment. Further, the case manager and physiotherapist failed to take into account any possible cultural issues which might arise in such a situation. Although the evidence indicated that the interview was done in this manner because the case manager was having difficulty reaching the Appellant by telephone, no evidence was provided to explain why this interview could not have been conducted after the treatment was finished.

The Commission, regardless of any acquiescence to this which the physiotherapist may have interpreted on the Appellant's part, is surprised that a professional caregiver such as the

physiotherapist would have allowed this to occur, or that a caseworker would have even made such a request.

MPIC may wish to review its procedures regarding situations in which case managers should or should not be attending at treatment appointments between claimants and their caregivers, even where such consent is ostensibly given.

In spite of this, after considering the documentary evidence on file and the testimony of the Appellant, the panel does not find that the Appellant was a reliable or credible witness. Many of his answers were evasive and he displayed an ability to recall certain dates and documents with precision, while claiming to have no recollection at all in other areas.

For example, when giving evidence regarding the layout of the physiotherapy treatment room in relation to general exercise areas within the clinic where other physiotherapists utilize equipment, the Appellant's evidence was extremely vague. Even when questions were framed in various ways, through an interpreter, to attempt to assist him to understand the question and provide the information, his answers were vague and somewhat evasive.

The Appellant displayed a good recall for dates and documents that he wanted the Commission to consider, but found it difficult to recall many other points.

The contradictions between what the panel observed on the videotapes, the Appellant's statements to various caregivers regarding his abilities, and his testimony at the hearing, leads us to conclude that the Appellant was not forthright in his dealings with MPIC and his caregivers and that he did, at certain times, exaggerate his difficulties.

Although counsel for the Appellant argued that any differences or gaps between the Appellant's abilities and his reporting of them could be explained by his difficulties with the English language and by his mental health issues arising out of the motor vehicle accident, the panel finds that although the evidence did not establish that the Appellant was able to work, his behaviour and lack of candor has prevented all those involved in trying to help him, from making appropriate and accurate assessments of his abilities, conditions and needs.

Based upon the Appellant's lack of reliability and credibility, the panel finds that he has failed to meet the onus upon him of showing, on a balance of probabilities, that the decisions of the case manager and Internal Review Officer which found that he knowingly provided false information to the Corporation should be overturned.

The Appellant's appeal in this regard is denied, and the Internal Review Decision of December 9, 2008, terminating the Appellant's benefits for knowingly providing false information, is hereby upheld.

The decision of the case manager, dated June 19, 2008, also led MPIC to claim repayment of PIPP benefits received by the Appellant, from November 5, 2007. However, the panel does not agree with the decision of the Internal Review Officer to recover these benefits pursuant to Section 189 of the MPIC Act.

The panel finds that it has never been established that the Appellant is disentitled to benefits on the basis that he is able to work. On the contrary, the medical evidence established that he is unable, due to injuries, both mental and physical, to continue employment.

The Appellant's benefits from June 19, 2008 were terminated, pursuant to Section 160 of the MPIC Act, for providing false information.

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;

Section 160 does not use retroactive language. Nor did the case manager's decision of June 19, 2008 purport to apply Section 160 retroactively to disentitle the Appellant to the benefits he has already received.

The case manager's decision then went on to demand reimbursement for the benefits which the Appellant had already received, pursuant to Section 189 of the MPIC Act.

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.

Section 189 of the MPIC Act requires reimbursement only for an indemnity which is received but to which the person is not entitled. This Section requires that the Appellant not be entitled to the benefits he received. However, based upon the evidence before the panel, such as

[Independent Psychiatrist's] medical examination of November 15, 2007 that indicates the Appellant appeared to be partially disabled, we are not able to definitively conclude that the Appellant was not entitled to benefits, between November 5, 2007 and June 2008. Between November 2007 and June 2008, MPIC was only operating under suspicion that the Appellant was not telling the truth. It was not until June 19, 2008 that MPIC determined that the Appellant was not telling the truth and terminated his benefits. It was only at that point that he became disentitled to benefits, by operation of Section 160 of the Act.

The panel therefore finds that the Appellant was entitled to benefits between November 5, 2007 and June 18, 2008. He did not become disentitled to benefits until June 19, 2008, when MPIC concluded that he had provided false information and imposed a termination of benefits. Accordingly, until that time, he continued to be unable to work and to be entitled to benefits and MPIC was not entitled to demand repayment, pursuant to Section 189, of the benefits he had received.

Accordingly, the decision of the Internal Review Officer, under Section 189 of the MPIC Act, is hereby rescinded. The Appellant's appeal regarding the requirement to repay PIPP benefits received between November 5, 2007 and June 19, 2008 is hereby allowed.

Dated at Winnipeg this 2nd day of May, 2011.

LAURA DIAMOND

PAUL JOHNSTON

GUY JOUBERT