

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-016**

PANEL: Ms Laura Diamond, Chairperson
Mr. Les Marks
Ms Sandra Oakley

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

HEARING DATES: July 19 and 20, 2011

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits including Income Replacement Indemnity benefits and medical expense benefits.

RELEVANT SECTIONS: Sections 70(1), 81(1) and 136(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 a self-employed taxi cab driver who was involved in a motor vehicle accident on March 29, 2002 in [text deleted], Manitoba. After the motor vehicle accident, the Appellant complained of pain to her neck and upper back, as well as urinary stress incontinence. She attended for both chiropractic and physiotherapy treatments, but still complained of pain.

The Appellant continued to do her taxi driving duties until January 2004 (almost two years after the motor vehicle accident), when she stopped operating her taxi business, remaining unemployed and complaining of ongoing pain.

Following an independent medical review by [Independent Physiatrist], the Appellant's case manager wrote to her on May 16, 2008 indicating that while the Appellant appeared to have suffered a WAD I injury five and half years prior, there was no evidence to support any treatment, impairment or disability as a result of the accident and as such, no benefits would be forthcoming. The Appellant sought an Internal Review of that decision.

On November 4, 2009, an Internal Review Officer for MPIC reviewed a variety of medical information on the Appellant's file, including notes and reviews from [the Independent Physiatrist], [Appellant's Doctor #1], [Appellant's Doctor #2], [Appellant's Doctor #3], [Appellant's Neurologist], [Appellant's Chiropractor] and [MPIC's Doctor] and concluded that she was satisfied that the Appellant's ongoing symptoms did not relate to the motor vehicle accident. The Internal Review Officer noted that any minor motor vehicle accident related injuries she may have sustained would have been taken care of by the treatments which she received and that any symptoms of myofascial pain were likely perpetuated by the Appellant's underlying conditions of spondylosis, slouched posture and general conditioning. As she had returned to her taxi driving employment for two years after the motor vehicle accident and there was no plausible explanation as to why she would stop working after that, the Internal Review Officer upheld the decision of the case manager that the Appellant was not entitled to Income Replacement Indemnity ("IRI") benefits or any other benefits claimed regarding the motor vehicle accident.

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

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She described her life and employment history in [text deleted]. She explained how she had begun her taxicab driving business, beginning with a business plan, loans, and council support. She explained that she loved driving and that her cab service offered a 24 hour a day, 7 day per week service. Although she had three children living at home at the time, she described how well the taxicab business was working out. She would take calls at any time and her business grew during the period before the motor vehicle accident. She was making her full payments, always on time.

The Appellant then described the motor vehicle accident in [text deleted] and her attendance at the hospital after it occurred. She was given a prescription for an anti-inflammatory and noted that she was already feeling stiff by the time she went to pick up these pills. She drove home, took the pills and went to bed, feeling very stiff and sore on her whole right side.

After about a week, when the pain was still there, she went to see [Appellant's Doctor #2]. The Appellant explained that sometime after this she stopped seeing [Appellant's Doctor #2], as she resented him referring to her as "obese" and began seeing another doctor, [Appellant's Doctor #4].

The Appellant felt her doctors were not doing anything for her and, because of the pain, went to see [Appellant's Neurologist]. The Appellant explained that she was diagnosed with myofascial pain syndrome. She complained about [Independent Physiatrist], indicating that he hardly spoke with her during his examination.

The Appellant explained that before the motor vehicle accident she was able to do everything – help her customers with their kids and groceries and go pay bills for them. She was able to do everything she needed to do around the house as well.

After the motor vehicle accident the Appellant testified that she could not do much. She was lucky to even answer the phone on some days. Her daughter, who was [text deleted], had to help her doing everything that she used to do around the house, such as cleaning, sweeping, mopping, laundry and cooking. It was difficult for her to take care of one of her sons, [text deleted].

Her business was going down and she was losing her customers. She was unable to keep up with her payments and satisfy her creditors.

MPIC helped her with her physiotherapy and chiropractic treatments but encouraged her to continue working.

Her treatment benefits lasted until approximately 2004 when MPIC and her caregivers took the view that she had reached a plateau in recovery.

The Appellant could no longer participate in the sports that she loved to do before the motor vehicle accident and was reluctant to answer the phone, as she could not keep up with customers' demands.

Family members had to help her in cleaning her house.

The Appellant maintained that her vehicle was damaged in the motor vehicle accident, although MPIC refused to recognize that there was anything wrong with the vehicle and she paid for the repairs out of her own pocket. The Appellant testified that the pain still bothers her every morning and that she needs a patch or pills to deal with it. She said that she never used to take pills, even for headaches, before the motor vehicle accident. She wanted to make a better life for herself and her kids with her taxi business and had worked as much as she could. Now, because of the motor vehicle accident, she can no longer work.

On cross-examination, the Appellant maintained that even though there was no apparent damage to the motor vehicle from the accident, a “person inside the vehicle was damaged”. She acknowledged that she continued to drive the cab for two years after the motor vehicle accident although her previous hours of being available for 24 hours a day, 7 days a week, were now cut down to 6-8 or 10 hours a day, split up between different trips, with rests in between.

She was also asked about her weight gains and losses, and the claims which she had made to officials at CPP Disability that she had gained 60 pounds as a result of the motor vehicle accident. She was also asked about her claims that [Independent Physiatrist] did not properly examine or interview her and why she had claimed that her bladder problems resulted from the motor vehicle accident when later investigations showed that these problems could not have been a result of the motor vehicle accident.

The Commission also heard evidence from the Appellant’s daughter, oldest son and niece. They explained that there were many changes in the Appellant following the motor vehicle accident. They testified that she used to be active and able to drive her cab and take care of her house.

Following the motor vehicle accident, she could no longer keep up with her taxi business and was taking a lot of pills. She couldn't go anywhere, even to visit friends, and required help from family and friends to take care of the house. Her homemaking skills, which had been very good prior to the accident, deteriorated.

The Commission also heard evidence from several of the Appellant's friends, clients and acquaintances from [text deleted]. They also testified regarding the Appellant's housekeeping abilities and hard working availability as a taxi driver prior to the motor vehicle accident. However, they explained that after the motor vehicle accident she was not able to keep her house clean and required help for this. As well, after the motor vehicle accident her taxicab service was not as accessible as it had been before and the Appellant no longer participated in social or recreational activities as she had done before the motor vehicle accident.

Counsel for the Appellant submitted that this appeal involves issues of causation and functional impairment. However, he pointed out that [MPIC's Doctor], had provided an early opinion indicating that the motor vehicle accident had resulted in or caused the Appellant's injury. He had also offered a severe critique of [Independent Physiatrist's] independent report and put forward a different understanding of the medical literature regarding the chronic symptomatology of whiplash injuries.

For example, counsel noted that in May of 2004, [MPIC's Doctor] had noted that:

“Since the collision in question, the patient has had a continuum of cervicothoracic and upper extremity/shoulder girdle difficulties.

At this time, the medical evidence indicates that the patient's regional Whiplash-Associated Disorder Grade II is a probable consequence of the collision in question.”

On September 17, 2007, [MPIC's Doctor] stated:

“My last review appears to be on May 31, 2004.

At that time, it was my opinion that the patient had ongoing pain complaints which were probably causally related to the collision in question given the information on file. I am unaware of any data to change that opinion.”

[MPIC's Doctor] recognized a “probably diagnosis of whiplash which accounts for her ongoing cervical spine discomfort, shoulder discomfort, as well as headaches”. However, he stated:

“...At this time, there is insufficient evidence of impairment related to the Whiplash-Associated Disorder to conclude that she is unable to perform her occupation as a taxicab driver.”

Counsel also encouraged the Commission to take into account the subjective evidence of the Appellant, with objective confirmation from the witnesses, confirming the health issues she had suffered following the motor vehicle accident. He noted that a huge amount of the Appellant's time had to be spent on travel for doctor's appointments, treatment and to the pharmacy, because she had to transfer from [text deleted] to [text deleted] for all that. In his view, a self-employed person spending this amount of time on recovery, should be entitled to IRI benefits. It interfered with her availability to drive her cab 24/7.

He also submitted that the 6 to 8 or 10 hours a day when the Appellant was able to drive should be considered as a percentage of the total 24 hours a day that she had previously been available to drive, such that after the motor vehicle accident, she was unable to work beyond 20% to 40% of her capability.

He also urged the Commission to consider the impact of the modified work she had to do because of the motor vehicle accident, as she was no longer able to help her customers as she had previously.

Counsel submitted that the evidence demonstrates that the Appellant was incapable of doing any work, and the fact that she is now in receipt of permanent disability benefits from CPP shows the chronic, prolonged nature of this particular issue.

Counsel also reviewed reports from [the Appellant's Doctor #5], [Independent Physiatrist] and [Appellant's Neurologist]. He noted that the time the Appellant had actually spent with [Independent Physiatrist] was minimal, and that all of her caregivers took a different position than he had. He referred to [Appellant's Neurologist's] statement on January 17, 2010 that the Appellant had "severe myofascial pain syndrome" and should receive disability insurance.

Counsel also noted that [MPIC's Doctor] had criticized [Independent Physiatrist's] opinion and indicated that there was insufficient evidence regarding the requirements of the Appellant's job. Counsel criticized the case manager for failing to follow [MPIC's Doctor's] recommendations and find out what the actual demands of a taxi driver are. He pointed out that there was no functional capacity evaluation on the file and thus, no understanding of the problems that the Appellant was having with her business. He submitted that the case manager and Internal Review Officer had engaged in "cherry picking" in their review of the medical information on the file. They had failed in their duty under Section 138 and Section 150 of the MPIC Act

A report from [Appellant's Doctor #5] dated March 5, 2008, indicated that the Appellant demonstrated "signs and symptoms characteristic of myofascial pain which is likely perpetuated by underlying spondylosis, the patient's slouched posture and deconditioning".

Counsel also referred the Commission to a report from [Appellant's Doctor #6] dated October 5, 2007 indicating the Appellant suffered from myofascial pain syndrome following her motor vehicle accident in 2002.

[Appellant's Neurologist's] report of November 22, 2006 was referred to, although counsel disputed his claim that the Appellant did not suffer from immediate pain at the time of the motor vehicle accident. His letter of November 21, 2006 indicated that the Appellant has a "severe myofascial pain syndrome resulting from a motor vehicle accident four years ago".

A report from [Appellant's Doctor #3] dated July 15, 2005, indicated that the Appellant suffered from chronic shoulder pain and possible post traumatic headaches as well as a depressed mood, possibly secondary to chronic pain, and [Appellant's Doctor #4] confirmed, on February 16, 2005 that the Appellant didn't work from January 2004 due chronic neck and back pain after a prior motor vehicle accident and, on January 18, 2005, that during 2004 she could only manage restricted work hours.

Counsel also reviewed a number of reports from [the Appellant's Doctor #4] and from [Appellant's Chiropractor], between October 2003 and June 2004, referring to the Appellant's neck, shoulder and back pain.

In counsel's opinion, all of these reports supported the Appellant's position that due to tenderness, pain and myofascial or chronic pain, she could no longer meet the demands of her occupation.

Counsel also provided case law to support the position that subjective pain is important and should be recognized as well as the importance of recognizing chronic pain.

In support he referred to the decision of the British Columbia Supreme Court in *Sandher vs Hogg*, 2010 B.C. SC 1152, and the decision of the Commission in *AC-05-64*, particularly the excerpts from Richard Hale's text "Disability Insurance Canadian Law and Business Practice", for a summary of law relating to chronic pain conditions which can be caused as a result of motor vehicle accidents.

Counsel submitted that the evidence heard on behalf of the Appellant was credible and corroborated and that the complex issues of the Appellant and her sole proprietorship business should be addressed by the Commission. The Commission should find that the Appellant's injuries were caused by the motor vehicle accident and that she was unable to work as a result. The question of the Appellant's IRI entitlement should be referred back to the Appellant's case manager for calculations appropriate on a fractional basis and MPIC's failure to provide the Appellant with the appropriate supports in accordance with Section 138 and 150 of the MPIC Act should be addressed.

Evidence and Submission for MPIC:

Counsel for MPIC submitted that the issue was whether the Appellant's symptoms related to the motor vehicle accident and whether the Appellant had met the onus upon her of establishing entitlement and showing that she was unable to drive her taxicab as a result of the motor vehicle accident.

As a result, counsel for MPIC relied upon the medical reports and opinions on the Appellant's indexed file. [Independent Physiatriist] examined the Appellant and, following an independent medical exam provided an impartial report as a physical medicine specialist. His opinion was based upon reasonable medical certainty and counsel noted that just because the Appellant or her counsel objected to him, does not mean that he was not an independent specialist.

Counsel noted that the motor vehicle accident did not involve the transmission of significant force and that there was no significant structural injury or external damage to the motor vehicle.

If any injury had occurred to the Appellant at all, it was one of mild strain. There was no plausible explanation for her ongoing complaints and no objective findings in that regard. As a result, it must be concluded that there was no reason that the Appellant could not drive a taxi following the motor vehicle accident.

Counsel for MPIC clarified the few criticisms that [MPIC's Doctor] had made regarding [Independent Physiatriist's] findings, and pointed to [Independent Physiatriist's] notes in the report of May 13, 2008 (providing further information in response to [MPIC's Doctor's] questions). There were no significant findings, no objective findings, no tenderness and no plausible diagnosis for the Appellant's ongoing neck pain.

Counsel noted that, as [Independent Physiatriist] had recognized, the Appellant suffered a WAD I whiplash type injury to her cervical and thoracic spine. She had continued working for two years following the motor vehicle accident, and this was not consistent with any significant zygo-apophyseal joint injury. No therapy was required and there was no reason why the Appellant could not drive a taxi.

In fact, counsel pointed out that [MPIC's Doctor's] request for further information demonstrated his objectivity, lending credence to his view that there was no significant physical impairment or treatment required for the Appellant. [MPIC's Doctor] had attempted to be fair to the Appellant all along. In 2004 he suggested that her early pain complaints were related to the motor vehicle accident but, he still recognized that there was not enough evidence to suggest that the Appellant could not drive a taxi.

Counsel also referred to [Appellant's Doctor #5's] opinion that there was insufficient evidence of an impairment of function, recognizing the difficulty of externally validating the Appellant's complaints of pain.

Counsel for MPIC reviewed other medical reports on file. He noted that [Appellant's Doctor #3] and [Appellant's Doctor #2] did not say that the Appellant could not work and that [Appellant's Doctor #4] referred only to vague tenderness but not to specific pain supporting her claim that she cannot work.

[Appellant's Doctor #5] noted that the Appellant's range of motion was fine and, a proper interpretation of her report indicated not that the Appellant has myofascial pain, but rather that she suffered from some signs and symptoms characteristic of such myofascial pain. [Appellant's Doctor #5] did not find any nerve issues and does not say anything about whether or not the Appellant can work.

Counsel noted that the Appellant relies on reports of the [Appellant's Neurologist] to say that she has myofascial pain and cannot work. However, [Appellant's Neurologist] does not note any objective findings. In addition, he is not a physical medical specialist, but rather a nerve

specialist who suggested a referral to a physiatrist. Further, it is not obvious that [Appellant's Neurologist] saw all of the medical reports on the Appellant's Indexed file and his report is not detailed as other reports, it should not be given as much weight as those of [Independent Physiatrist], [Appellant's Doctor #5] and [MPIC's Doctor].

Counsel also noted that the Appellant has never had her driver's licence taken away from her.

In regard to the Appellant's CPP benefits, he noted that different standards and different evidence are applied by that agency; in fact, there was no evidence that the opinions of [Appellant's Doctor #5], [Independent Physiatrist] or [MPIC's Doctor] were ever shared with CPP.

The standard before the Commission is the standard of a balance of probabilities. The Commission must ask itself what is the more probable scenario. Counsel for MPIC queried whether it is probable that the Appellant's complaints relate to a minor motor vehicle accident. She drove a taxi for over a year after that motor vehicle accident, and it is not reasonable to conclude that the motor vehicle accident caused a current inability to drive. Other reasons and secondary factors present a more likely explanation.

Counsel also submitted that the Appellant is prone to exaggeration when it suits her. He submitted that her demeanour on testimony was not credible and she was sometimes vague and argumentative upon cross-examination.

The lay evidence from her family and friends regarding her ability to drive a taxi does not provide missing medical evidence to show that the Appellant was not able to perform the

necessary tasks of her job. We do not have, he submitted, any medical evidence to persuade the panel that the Appellant was impaired and not able to do her job. Where are the medical reports, he queried, supporting her lack of ability to work and setting out the limitations in range of motion and medications which keep her from driving a taxi? The Appellant has not filled in that gap of evidence, he submitted, by providing lay evidence from her friends, family and acquaintances.

The Appellant's whole case is based upon subjective complaints of muscular pain which are not reliable, due to her tendency to exaggerate. Accordingly, the onus is on the Appellant to show on a balance of probabilities that, due to the motor vehicle accident she was not able to perform the essential tasks of her job, and she has failed to meet this onus.

As a result, the Appellant's appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that she is entitled to Personal Injury Protection Plan ("PIPP") benefits, including Income Replacement Indemnity ("IRI") and medical expense benefits, as a result of injuries arising out of the motor vehicle accident.

The MPIC Act provides:

Definitions

[70\(1\)](#) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

- (a) by the autonomous act of an animal that is part of the load, or
- (b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile;

Entitlement to I.R.I.

[81\(1\)](#) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

Reimbursement of victim for various expenses

[136\(1\)](#) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

The panel has reviewed the documentary evidence on the Appellant's indexed file, the testimony of the Appellant and other witnesses and the submissions of counsel for the Appellant and MPIC.

In addition to the verbal testimony provided at the hearing, the panel has taken particular note of a number of medical and other reports on the Appellant's file which are of assistance.

The initial Health Care Report completed by [Appellant's Doctor #2] in April of 2002 provided a diagnosis of whiplash, from which the Appellant was slowly recovering. His report of May 23, 2002 indicated that the Appellant at that time was unable to perform her duties as a self-employed taxi driver due to accident related injuries.

On June 30, 2002, a physiotherapist, [text deleted] indicated that the Appellant was at less than full function due to symptoms and/or functional deficits, noting "attempt to limit rotation movements, extension of C-spine".

A diagnostic imaging report from October 4, 2002 indicated that the height and alignment of the Appellant's vertebral bodies were normally maintained, although small marginal osteophytes were noted. No disc narrowing was demonstrated and the SI joints appeared normal. This report indicated, aside from some indication of degeneration (osteophytes), a normal spine.

An initial Health Care Report dated October 28, 2002 from [Appellant's Doctor #1], noted pain in the Appellant's upper thoracic spine and neck with a diagnosis of Whiplash Associated Disorder I. Although the report indicated a decrease of driving in the taxi business to 10 hours from 24 hours, [Appellant's Doctor #1] indicated the Appellant had full function with symptoms.

Based upon these reports, the panel finds that the Appellant was entitled to IRI benefits during the period between the motor vehicle accident and October 28, 2002, due to her whiplash symptoms.

The Appellant's evidence indicated that she was doing some driving during limited hours during this period, and accordingly, the panel finds that the Appellant should be entitled to IRI benefits between the motor vehicle accident and October 28, 2002, with any earnings which she may have earned being deducted from these benefits.

[MPIC's Doctor] reviewed the file and provided a report dated December 11, 2002. He noted [Appellant's Doctor #1's] description of the Appellant as being able to work modified duties and up to 10 hours a day, and noted no significant evidence of impairment preventing the patient from working.

On February 14, 2003, [Appellant's Doctor #7] noted whiplash injuries and pain but made no mention of modified duties.

On March 21, 2003, [Appellant's Chiropractor] indicated the Appellant was able to work modified duties by limiting lifting and bending. He did not say that she was not able to drive.

An occupational therapy report dated April 4, 2003 indicated that the Appellant continued in her job as a taxi driver although extended periods of driving reportedly continued to aggravate her pain. The Appellant also reported that she was independent with personal care and was increasing her involvement in household activities.

[Appellant's Doctor #4] provided a handwritten report dated August 21, 2003 noting tenderness all over her spinal column although the Appellant was not specific as to where she felt pain. She felt discomfort in her neck but there was no impaired range of either active or passive movement.

On January 30, 2004, [Appellant's Doctor #4] indicated the Appellant had been involved in a major motor vehicle accident in March 2002 with consequent chronic pain syndrome resulting from injury to the mid cervical joints with reactive myofascitis. This report made no mention regarding the Appellant's ability to work.

On February 6, 2004 [Appellant's Doctor #4] provided a note indicating:

“I hereby verify that above person is currently working 6-8 hours a day due to medical problems.”

On June 11, 2004, [Appellant's Doctor #4] reported that the patient had good range of movement. There was no tenderness or pain on palpitation but even though there weren't physical signs of pain this did not mean that the Appellant did not feel pain or discomfort. No note was made regarding the Appellant's ability to work, although on January 18, 2005, [Appellant's Doctor #4] indicated that during 2004 the Appellant could only manage restricted work hours and on February 16, 2005 she confirmed the Appellant didn't work from January 2004 due to chronic neck and back pain after a prior motor vehicle accident.

[Appellant's Doctor #3] reported on July 15, 2005 indicating that the Appellant's range of motion was full with tenderness on forward and backward flexion and no swelling, redness or differential warmth of the right shoulder. The neck examination was normal. He stated:

“An assessment of chronic shoulder pain and possible posttraumatic headaches was made, as well as a depressed mood possibly secondary to chronic pain.”

[Appellant's Neurologist] reported on November 21, 2006 indicating that the patient had severe myofascial pain syndrome resulting from a motor vehicle accident four years ago. He referred to the Appellant's neck pain and noted a clinical picture most consistent with myofascial pain syndrome but with no evidence of either a myelopathy or radiculopathy, recommending a referral to a physical medicine specialist. He reiterated this diagnosis of severe myofascial pain syndrome on May 29, 2009 and January 17, 2010, indicating in the May 2009 report that as a result of that condition she was unable to be meaningfully employed, including running her own business of taxi driving.

[MPIC's Doctor] commented on [Appellant's Neurologist's] reports on September 17, 2007 noting:

“...[Appellant's Neurologist] describes clinical findings related to tenderness of some of the paracervical and shoulder girdle muscles only. There was no neurological deficit. The diagnosis was one of myofascial pain syndrome...”

A report from July 2005 indicates the patient's neck examination was normal with full range of motion of the right shoulder.”

He agreed that these findings supported assessment by a physical medicine specialist and a referral to [Independent Physiatrist] followed.

[Independent Physiatrist] reported on December 27, 2007 concluding that:

“There does not appear to be any contraindication identified (structural or otherwise) as to why the claimant cannot work to improve and resolve the apparent soft tissue symptoms present...”

He opined that “the client should be able to return to her duties as a taxicab driver, as no apparent MVA in question injury components appear present currently”.

On February 15, 2008, [MPIC's Doctor] posed several further questions which he believed [Independent Physiatrist] had failed to address and, as a result, on May 13, 2008, [Independent Physiatrist] provided a further report dealing with queries that his diagnosis was incomplete with no rationale for the patient's ongoing neck pain. [Independent Physiatrist] indicated that:

“...there were no significant objective physical findings, no objective findings, full cervical range of motion with no pain, no cervical spine tenderness, and no zygo-apophyseal joint loading testing (Kemp's) performed (always combined with cervical foraminal compression testing in my examinations) produced no mechanical zygo-apophyseal joint irritative symptoms. This would not be consistent with any significant zygo-apophyseal joint involvement as per the current examination.”

He indicated that no plausible physical diagnosis had been identified and that the motor vehicle accident had resulted in a likely WAD I whiplash-type injury. He concluded:

“Related to the MVA in question of 5½ years ago, no MVA related physical diagnosis appears present, no related further treatment appears required and no physical / structural contraindication has been identified currently as related to the MVA in question, to prevent the claimant from returning back to her taxi driving duties that she performed for several years following the MVA.”

In March 2008, [Appellant's Doctor #5] reported upon her examination of the Appellant. She found that lumbar spine range of motion was slightly decreased in extension on forward flexion but that upper and lower extremities and cervical spine range of motion were preserved on all planes. She indicated:

“The patient demonstrates signs and symptoms characteristic of myofascial pain which is likely perpetuated by underlying spondylosis, the patient's slouched posture and deconditioning. She does not fulfill criteria for a diagnosis of fibromyalgia and on today's examination, I did not find evidence of cervical or lumbosacral radiculopathy or myelopathy.”

Although [Appellant's Doctor #5] made some treatment recommendations, she did not opine that the Appellant could not work because of her findings.

A more recent report from [Appellant's Doctor #2] dated February 27, 2010 indicated:

“This [text deleted] year old female was in a motor vehicle accident on March 29, 2002 (was rear-ended). Since then she has had severe myofascial pain syndrome and has seen several specialists with no relief.”

A final report from [MPIC’s Doctor] was provided on August 5, 2010. His inquiry focused on whether the Appellant has an impairment of function that would prevent her from working. He noted there had been limited physical findings ascribed to the Appellant and that her pain experience was the primary impediment to a return to work. He reviewed [Appellant’s Doctor #5’s] report, noting that while it confirmed the patient’s ongoing pain, it also confirmed preserved cervical spine range of motion and no obvious strength deficit:

“...Therefore, from an objective standpoint there was insufficient evidence to indicate the patient had an impairment of function which would not allow her to perform the essential duties of her occupation. This was consistent with the previous documentation in her bodily injury claim file.”

[MPIC’s Doctor] also reviewed [Independent Physiatrist’s] report and concluded that:

“The information from [Independent Physiatrist] did not indicate a probable impairment of function which would prohibit the patient from performing the essential duties of her occupation in an objective and verifiable basis.”

He reviewed [Appellant’s Neurologist’s] comments that the Appellant has myofascial pain syndrome but noted that:

“[Appellant’s Neurologist] does not provide objective evidence of impairment to indicate that the patient had an impairment of function which would prohibit her from performing the essential duties of her occupation.”

Nor, he opined, did [Appellant’s Doctor #2’s] letter of June 7, 2010 provide such objective evidence of impairment.

[MPIC’s Doctor] acknowledged that pain can cause an impairment of function. He appears to have recognized the relevance of the Appellant’s pain, as described in the Commission’s

decision AC-05-64 and in excerpt from *Richard Hill's* text reviewed by counsel for the Appellant. However, his concern in the Appellant's case was that in the context of occupational readiness, as an independent reviewer, objective measures typically used for pain could not be externally validated. He noted that the patient's cervical spine range of motion restriction had improved with treatment and that there was no significant neurologic defect identified on a continual or consistent basis, nor had there been consistent strength deficits documented which would cause an impairment of function.

In this regard, the panel must assess and have regard to the credibility of the Appellant.

Having reviewed the Appellant's evidence, the panel agrees with the comments made by counsel for MPIC regarding the question of her credibility. We noted discrepancies in her evidence regarding areas such as her weight gain, the seriousness of her motor vehicle accident and any damage and repairs to her vehicle as a result, her claims regarding [Independent Physiatrist's] examination and her selectivity in providing materials to CPP. We find that her demeanour through her testimony was not credible, and that she was often vague and argumentative upon cross-examination.

Having regard to the panel's findings regarding the Appellant's credibility, we must then assess the objective evidence before us to determine whether it supports the Appellant's subjective complaints.

Between the period of March 29, 2002 and October 28, 2002, the reports from the Appellant's caregivers confirmed that the Appellant was unable to perform her full duties as a taxi driver,

due to a diagnosed whiplash suffered in the motor vehicle accident and documented functional deficits which resulted.

However, by October 28, 2002 diagnostic imaging and reports from her caregivers noted full function with symptoms, indicating the Appellant was working up to 10 hour days. An X-ray report dated October 7, 2002 confirmed a normal spine, aside from some indications of degeneration.

The panel has reviewed multiple opinions from a variety of physicians, caregivers and specialists which were provided in the period following October 2002. It is difficult to determine which of these opinions were formed on the basis of the Appellant's subjective reports of symptoms. However, after carefully weighting all of the evidence presented, the panel finds that the medical evidence, on the whole, does not support a finding of objective functional impairments after October 28, 2002.

Beyond the Appellant's subjective complaints, the medical evidence from the period does not document a clear picture of objective signs and impairments.

[MPIC's Doctor] noted the difficulty in externally validating the Appellant's pain reports, particularly when combined with a lack of evidence of physical impairment, and a patient who was able to work for the first 12 to 18 months after the event, despite her complaints of pain.

“...The medical evidence in this woman's bodily injury claim file, consistently fails to demonstrate evidence of physical impairment which would indicate that the patient was probably not able to perform the essential tasks of her occupation on a physical basis. I would note that for the first 12 to 18 months after the event in question, the patient was able to work despite her complaints of pain.

I would state that my opinion regarding the patient's impairment of function in relationship to her ability to carry out the essential tasks of her occupation has not changed."

The panel agrees with [MPIC's Doctor's] comments.

We find that the Appellant has failed to establish on a balance of probabilities that she was unable to work after October 28, 2002 as a result of functional impairments arising out of the motor vehicle accident.

Nor did the Appellant establish a medical necessity arising out of the motor vehicle accident for further treatment and benefits to be supported by MPIC.

Accordingly, the panel finds that the Appellant should be entitled to IRI benefits from March 29, 2002 to October 28, 2002. The calculation of the IRI benefits owing to the Appellant during this period will be referred back to the Appellant's case manager for calculation, having regard to any actual income which the Appellant may have earned during this period.

The Appellant's appeal regarding IRI benefits and medical expense benefits between March 29, 2002 and October 28, 2002 is hereby allowed, and the Internal Review Decision dated November 4, 2009 shall be amended accordingly.

The Appellant's appeal for IRI and medical expense benefits after October 28, 2002 is hereby dismissed and the Internal Review Decision dated November 4, 2009 is upheld in that regard.

Dated at Winnipeg this 28th day of September, 2011.

LAURA DIAMOND

LES MARKS

SANDRA OAKLEY