Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-117 AND AC-11-063

PANEL:	**Ms Laura Diamond, Chairperson** **Mr. Robert Malazdrewich** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **[Text deleted] and [text deleted] were in attendance as Interpreters.** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**October 4, 2012**
ISSUE(S):	**1. Entitlement to Permanent Impairment benefit in relation to a disc herniation in the Appellant's lumbosacral spine.** **2. Whether the suspension of the Appellant's Income Replacement Indemnity benefits was appropriate and valid.**
RELEVANT SECTIONS:	**Sections 127 and 160(c),(e),(f),(g) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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

Reasons For Decision

The Appellant was injured in a motor vehicle accident on August 13, 2008. As a result of the accident he sustained low back pain extending into his right leg, sore neck and headache. He attended to his family doctor, and received chiropractic and physiotherapy treatments. He was also in receipt of Income Replacement Indemnity ("IRI") benefits.

The Appellant attended for a multi-disciplinary assessment at [rehab clinic #1], as well as a reconditioning program.

A CT Scan report dated October 6, 2008 noted minor diffuse disc bulging at L3-L4 and a congenitally small central spinal canal occupied by moderate diffuse posterior disc bulging resulting in spinal stenosis, at L4-L5.

An MRI report dated February 1, 2009 noted degenerative disc desiccation and mild narrowing of the L4-L5 and L5-S1 intervertebral discs, shallow central disc herniation at the L4-5 level and arthropathy and hypertrophy resulting in mild central spinal stenosis. As well, at the L5-S1 level, there was a moderate central and left foraminal disc herniation.

The Appellant saw [Appellant's doctor #1], who reported on February 23, 2009 and June 3, 2009. [Appellant's doctor #1] was of the view that the motor vehicle accident or subsequent manipulation had aggravated his pre-existing asymptomatic facet joint arthropathy and that the Appellant had developed chronic right L5-S1 radiculitis with mechanical and myofascial lumbosacral pain due to the herniations.

The Appellant's case manager wrote to him on September 28, 2009 providing him with a permanent impairment award of 6% for lumbar disc herniation in accordance with Division 1; Subdivision 3, Item 4(a)(iii) in Schedule A of Manitoba Regulation 41/2000.

The Appellant requested an Internal Review of this decision, maintaining that his presentation was in keeping with discogenic low back pain with right leg radiculitis and accordingly his

permanent impairment assessment should have been based on the provisions of Division 2, Subdivision 4 of the Regulations.

[MPIC's doctor] reviewed the Appellant's file and in an Interdepartmental Memorandum dated November 5, 2009, he indicated that:

> "The medical evidence does not support the conclusion the disc herniations noted radiologically developed as a direct result of the incident in question.
>
> The information leads me to conclude the MVA made a pre-existing condition (degenerative disc disease – disc problems/herniation) symptomatic.
>
> Based on this – awarding the above noted impairment is premature in my opinion."

This was followed by another decision of the case manager dated March 5, 2010 which indicated that because the medical information on the file did not support the conclusion that the disc herniation and subsequent radiculitis developed as a result of the motor vehicle accident, MPIC had paid the Appellant's impairment payment for lumbar disc herniation in error.

The Appellant sought an Internal Review of this decision.

On June 22, 2010, an Internal Review Officer reviewed the Appellant's file. The Internal Review Officer referred to [MPIC's doctor]'s report of November 5, 2009 and a later report of May 10, 2010 which indicated that reports did not assist in clarifying the origin of the documented disc abnormalities in the Appellant's lumbosacral spine.

The Internal Review Officer then concluded:

> "As indicated by [MPIC's doctor], the evidence on your file does not necessarily indicate that your disc herniation is permanent and therefore, it would be improper to award a Permanent Impairment benefit at this time."

As a result, the decision of the case manager was upheld.

The Appellant now appeals that decision of the Internal Review Officer.

The Appellant was also in receipt of Income Replacement Indemnity ("IRI") benefits from MPIC. Following his reconditioning program at [rehab clinic #1], it was recommended that the Appellant participate in a graduated return to work program. This program was available on a gradual basis through his employer. The recommended schedule was to increase his work hours over a period of four weeks to return to full-time work after the four weeks.

The Appellant attended to work at his employer only once, but left early due to pain complaints. His case manager wrote to him on May 11, 2009 suspending his IRI benefits as of May 3, 2009 pursuant to Section 160(c),(e),(f),(g) of the MPIC Act. The case manager indicated that despite the Appellant's ongoing assertion that he was unable to return to his pre-accident employment, there had been no new medical information providing objective medical findings to support this. As he did not participate in the graduated return to work program, his entitlement to IRI was suspended for refusing to return to his former employment, refusing to follow medical treatment recommended by a medical practitioner and for not following or participating in the rehabilitation program.

The letter of suspension went on to further end the Appellant's entitlement to IRI as of May 3, 2009, in accordance with Section 110(1)(a) of the MPIC Act on the basis that he was able to hold the employment that he held at the time of the accident.

The Appellant sought an Internal Review of this decision. On April 14, 2011, an Internal Review Officer for MPIC upheld the case manager's decision suspending the Appellant's benefits.

On January 3, 2012, an Internal Review Officer for MPIC issued an Internal Review decision which considered further medical reports received on the Appellant's file. The Internal Review Officer considered [Appellant's doctor #1]'s letter of June 3, 2009, a Functional Capacity Evaluation from the [rehab clinic #2] dated September 30, 2009, a report from the Appellant's traditional Chinese medicine doctor dated March 7, 2010 and a report from MPIC's Health Care Services Consultant dated July 6, 2009. After reviewing the other reports, the Health Care Services Consultant had concluded:

> "...At the present time, the file does not contain information indicating [the Appellant] has improved from a functional standpoint to the extent he is able to return to his regular full time duties."

Accordingly, the Internal Review Officer concluded that the Appellant's IRI should not have been terminated on May 3, 2009 on the basis of Section 110(1)(a) of the MPIC Act.

The Appellant is now appealing the Decision of the Internal Review Officer dated April 14, 2011 upholding the suspension of his benefits, as well as the Internal Review Decision dated June 22, 2010 denying entitlement to a permanent impairment award.

A number of Case Conference Hearings were held by the Commission with the parties to define and delineate the issues remaining between the parties. The issues were defined as:

a) Whether the Appellant is entitled to a permanent impairment benefit in relation to a disc herniation in his lumbosacral spine; and

b) Whether the suspension of the Appellant's Income Replacement Indemnity (IRI) benefits pursuant to Section 160(c), (e), (f) and (g) of the MPIC Act was appropriate and valid.

Following the case conference process, counsel for MPIC took the position that the decision letter suspending the Appellant's benefits was "meant to be a termination letter" and that the intent was to end benefits at that time and on an ongoing basis.

At the commencement of the hearing on October 4, 2012, counsel for MPIC confirmed that a review of the documents on the Appellant's file indicated that the Appellant, through his representative, had indicated a willingness to participate in a graduated return to work program in approximately February of 2010. Accordingly, counsel for MPIC confirmed that the Appellant's suspension would end as of February 8, 2010, and that the issues under appeal were defined as the Appellant's entitlement to a permanent impairment benefit and the validity of his suspension for failure to participate in a graduated return to work program between May of 2009 and February of 2010.

However, counsel for MPIC objected to the jurisdiction of the Commission to hear the Appellant's appeal regarding the permanent impairment award. He noted that when the Appellant's permanent impairment award was first assessed, he was provided with an award of 6% on September 28, 2009. This amount was received by the Appellant. Then, although the case manager later issued a new decision, on March 5, 2010, indicating that the payment for a permanent impairment benefit had been previously paid in error, MPIC was not pursuing recovery of the previously paid permanent impairment entitlement. Although the Appellant went on to seek an Internal Review, this became only a theoretical issue when MPIC did not seek to recover the permanent impairment amount previously paid.

Counsel for MPIC submitted that this issue was now only theoretical and moot and that there was not a live issue between the parties in regard to the permanent impairment award appeal.

The Appellant's representative replied that the Appellant had, from the outset, disputed the permanent impairment award for disc herniation as the Appellant had not been compensated for his radiculitis. He indicated that both issues were connected and could not be separated out, as there was no medical disconnect between the two questions.

As a result, the Appellant's representative submitted that the Commission should hear and decide the Appellant's appeal in regard to the permanent impairment benefit.

The Commission made note of the comments made on behalf of the Appellant and MPIC in regard to this jurisdictional issue and reserved its decision in this regard. The panel proceeded to hear the evidence and submissions regarding the substantive issues between the parties in the appeal.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described the employment he held at the time of the accident, which was working at a cleaning job. The job included sweeping, mopping and waxing and stripping floors. He explained that it was hard work, but that he enjoyed it. He was very happy with his job and was paid well. He worked at that job from 1996 until the day he got hurt in the motor vehicle accident.

The Appellant then described the motor vehicle accident and the damage to his vehicle. He said that he was hurt and went home to take Tylenol. Then he went to see his family doctor,

[Appellant's doctor #2], who sent him for X-rays and a CT scan of his back and then confirmed that there were problems with his lower disc affecting his back and the back of his legs.

The Appellant explained that he had never had any disc problems, or other back problems before the motor vehicle accident, and that he used to work hard twelve hour days without any problems.

He then described the pain which he felt following the motor vehicle accident, which made it difficult for him to even sit in one position.

[Appellant's doctor #2] sent the Appellant to see [Appellant's doctor #1], and has been seeing him every couple of months for ongoing treatment. He was also referred to a pain clinic, which gave him injections as pain killers. He continues to take Tylenol three times a day, and even more when the pain is worse. The Appellant also sought chiropractic and physiotherapy treatments, although he found that neither helped him very much. The Appellant demonstrated where the pain fell in his lower back and down his legs and explained that walking long distances or getting up from a sitting position creates severe back pain flowing down into the back of his legs.

The Appellant also explained his attempt to attend a gradual return to work program. He did not feel fit to return to work, but felt that MPIC was insisting that he try, so he did attempt it. He understood from MPIC that if he did not go back to work, they would stop his IRI payments.

The Appellant described the day he tried to go back to work. He got up at 1:00 a.m. and arrived at work, at a [text deleted] on [text deleted], at 2:00 a.m. It took him approximately 20 minutes

to drive there. He started working, even with pain, for about 20 minutes, sweeping the floor. The pain started getting worse and he started feeling dizzy, fearing that his blood pressure was high. He experienced pain in his lower back and the back of his legs. As a result of his distress, he asked one of his coworkers to call home. He sat and waited, and after about 25 minutes his brother and sister-in-law came to pick him up. One drove his car and the other took him in their car to the [hospital]. When he arrived at the hospital, the doctors gave him Tylenol and examined him. They also gave him an injection and a note that he should not go anywhere, but should rest for the next seven days. He got home at about 10:50 a.m. the following morning and stayed in bed after that. After seven days, he went to see [Appellant's doctor #2] who gave him a muscle relaxant and Tylenol.

The Appellant testified that after the incident when he attended at the [hospital], he did not speak again with his case manager. A few months after the incident, he received a letter, but as he could not read English, he didn't know what to do about it. Eventually, he did attend at the case manager's office and presented her with the note which he had been given at the [hospital], telling him to stay home and rest.

The Appellant also gave a description of the conditioning program which he had participated in, prior to his attempt to return to work, at [rehab clinic #1]. He tried to do the exercises as best he could, but felt that [rehab clinic #1's doctor] and the other therapists were frustrated with his pain and that they felt that he was faking his pain.

The Appellant also described the treatment he received, on his own initiative, from a Chinese acupuncturist.

He explained that his intention was always to go back to work, because he had a lot of expenses and that he wished he could go back to work. He continues to experience difficulties with pain and problems sleeping at night.

The Appellant confirmed, on cross examination, that since the day he attempted to return to work and ended up at the [hospital], he had not attempted to work or work any additional days. He said that he had been unable to work because of the excruciating pain but that [Appellant's doctor #1] is still trying to treat his pain and he would like to return to work if he could.

The panel also heard evidence from a co-worker of the Appellant, [text deleted]. He described the day when the Appellant tried to return to work. He confirmed the evidence of the Appellant that the Appellant swept the floor for about 20 minutes and then said he was having pain in his lower back and laid down on the floor. The co-worker called the Appellant's relatives who came to work and drove him to the hospital. The co-worker was not aware of the Appellant ever having worked for the company again after that date, but he himself no longer works there.

The panel also heard evidence from the Appellant's sister-in-law, [text deleted], who lived in the same home with the Appellant in a joint family arrangement. She described the Appellant's problems following the motor vehicle accident and indicated that in her view, he was in pain, frustrated and depressed. She also described being called to pick up the Appellant from his place of work on the day that he began his graduated return to work program. She went with her husband to drive the Appellant to the [hospital] and she stayed with him there in the waiting room.

The Appellant's representative, [Appellant's representative], submitted that the Appellant should be entitled to a permanent impairment benefit in regard to his herniated disc, and that, in addition, a further permanent impairment should be awarded in connection with his radiculitis. [Appellant's representative] noted [Appellant's doctor #1]'s report of June 19, 2009 which noted:

> "My assessment revealed that he has a persistent right L5 and S1 radiculitis due to disc herniation at L4-L5 and L5-S1 level...
>
> In summary, [the Appellant] has developed chronic right L5 and S1 radiculitis with mechanical and myofascial lumbosacral pain due to L4-L5 and L5-S1 disc herniations..."

[Appellant's representative] submitted that [Appellant's doctor #1] discussed the Appellant's radiculitis and that there should be an additional permanent impairment benefit for this, although he was not able to point to a specific section of Regulation 41/2000 upon which to base this rateable impairment.

The Appellant's representative also submitted that the Appellant had valid reasons for not returning to work under the graduated return to work program due to his subjective pain, regarding which he testified at great length. [Appellant's representative] also reviewed the advice given to the Appellant by [Appellant's doctor #2], and set out in his report dated May 14, 2012, that the Appellant was unable to work due to his constant lower back pain.

[Appellant's representative] noted that the Appellant, upon the forceful urging of his case manager, had made an attempt to return to work but found it so difficult that he ended up at the Emergency Department of [hospital]. There, the doctor certified lumbar pain, gave him Tylenol, told him to rest for a week and to go see his doctor.

[Appellant's doctor #1]'s report of June 3, 2009 recommended treatment, but noted that:

> "...Unfortunately due to significant discogenic, mechanical and radicular pain, the physiotherapy program was not effective until now. The physiotherapy treatment will not be effective unless his radicular symptoms and signs improve with the treatment and then he will be able to participate in a conditioning and strengthening exercise program."

Even MPIC's Health Care Consultant, [MPIC's doctor], noted in a memorandum dated July 7, 2009, that [Appellant's doctor #1] was of the opinion that the Appellant was not fit to return to any form of gainful employment. He concluded:

> "Based on my review of [the Appellant]'s file, it is my opinion the information obtained from the file indicates [the Appellant] developed problems involving his lower back and right leg subsequent to the incident in question that in turn negatively affected his ability to perform all of the required demands of his pre-accident employment as of May 3, 2009 and thereafter. At the present time, the file does not contain information indicating [the Appellant] has improved from a functional standpoint to the extent he is able to return to his regular full-time duties."

The Appellant's representative urged the Commission to acknowledge the Appellant's condition of chronic pain and cited a number of decisions of the Commission and the Courts which recognized this condition.

The Appellant's representative submitted that due to the Appellant's subjective chronic pain and the objective causes for it found in the X-ray and CT scan, the Appellant had a valid reason for not participating in the graduated return to work program. The Appellant testified that if he gets relief from this pain he is more than willing to return to work.

As a result, he submitted that the appeal should be allowed and the Appellant should be entitled to IRI and any other benefits arising out of the motor vehicle accident.

Evidence and Submission for MPIC:

Counsel for MPIC explained that an initial impairment assessment dated September 22, 2009 indicated the Appellant should be entitled to a 3% permanent impairment for lumbar disc herniation at L4-L5, and a further 3% entitlement for lumbar disc herniation at L5-S1, pursuant to Division 1; Subdivision 3, Item 4(a)(iii) under Manitoba Regulation 41/2000.
He noted that this calculation of entitlement, for a total of 6%, did encompass the permanent impairment benefit for radiculitis.

On March 5, 2010, a case manager for MPIC noted that in the opinion of MPIC's Health Care Services team the permanent impairment award had been paid in error, as the medical evidence did not support the conclusion that the disc herniation and radiculitis developed as a result of the motor vehicle accident. The Appellant sought an Internal Review of that decision and the Internal Review Officer, on June 22, 2010, reviewed [MPIC's doctor]'s report of November 5, 2009 which discussed the causation question. The Internal Review Officer then concluded that the evidence on the Appellant's file did not necessarily indicate that the disc herniation was permanent and therefore, it would be improper to award a permanent impairment benefit at that time.

Counsel for MPIC submitted that relating the denial of a permanent impairment award to the lack of permanence of the impairment was simply a mistake on the part of the Internal Review Officer. [MPIC's doctor] had noted a lack of a clear connection between the Appellant's disc herniation and the motor vehicle accident, concluding that the motor vehicle accident had merely made a pre-existing degenerative disc condition symptomatic.

When one reviews the medical information on the Appellant's file it shows that the Appellant suffered more left-sided than right-sided changes, although he was clinically reporting right-

sided symptoms. Therefore, it had not been established that the disc herniation was a result of the motor vehicle accident.

Further, counsel submitted that it was clear that the Appellant should not be entitled to any separate award for radiculitis, as that was clearly encompassed by the award which had been made for disc herniation.

Counsel for MPIC submitted that as the Internal Review Officer had misinterpreted [MPIC's doctor]'s review, the Commission should exercise its power under Section 184 of the MPIC Act to correct the decision on that point. The Appellant had failed to meet the onus of establishing that there was a causal connection between the disc herniation and the motor vehicle accident, and that permanent impairment awards were not warranted.

Counsel for MPIC also submitted that the Appellant's case manager had acted properly in suspending the Appellant's benefits in May 2009 for non-compliance with the Appellant's return to work program. The Appellant was given lots of notice prior to the institution of the graduated return to work program, and prior to suspending his benefits, MPIC communicated with the Appellant indicating that they expected him to comply with the findings and recommendations in the [rehab clinic #1] Discharge Report, which [rehab clinic #1's doctor] elaborated upon in a letter dated April 8, 2009. That letter indicated:

> "As a result of all this, it would be most prudent for [the Appellant] to now start a return to work process, which is more practical and useful rehabilitative process for him at this time. There is no reasonable expectation that further involvement in "physiotherapy" or other structure (sic) rehab programs will be of any significant benefit to [the Appellant]. This would indicate that [the Appellant] is at his Maximal Medical Improvement, since it is not expected that his subjective symptoms will improve with additional treatment interventions. Additionally, there would be no definitive medical reason to indicate that he could not or should not be able to start a return to work process at this point in time. I make reference to the lack of correlation between the sides of his symptoms and the MRI

> findings, in addition to the fact that the findings on his scan are quite common in people without complaints of back pain and who conduct their lives normally."

Counsel for MPIC acknowledged that, following the incident which occurred at the [hospital] on April 7, 2009, the Appellant, within one week to one month afterwards, had provided a doctor's note to the case manager advising that he should be on sick leave for one week and follow-up with his family doctor. However, the letter did nothing to indicate why he was in the hospital or what was wrong with the Appellant. Nor did it pose any suggestion to the case manager that the Appellant would not attempt the graduated return to work program that had been recommended by [rehab clinic #1's doctor]. After receiving the note, the case manager sent out letters to the Appellant noting the graduated return to work program and the consequences of not adhering to it. They were sent to the Appellant at his usual address. Counsel noted that normal practice was for the Appellant to have them translated because he didn't read English, and also noted that one of the letters, dated April 15, 2009, was copied to his translator at that time, [Appellant's representative].

Counsel submitted that the case manager really had no choice but to issue the suspension letter dated May 11, 2009.

Following the suspension, the Appellant's file was held in abeyance. [MPIC's doctor] later reviewed the medical evidence on his file. Although he accepted the reports from [Appellant's doctor #1] and [Appellant's doctor #3] and concluded that the Appellant was not able to return to his regular full-time duties, [MPIC's doctor] supported the recommendation put forth by [rehab clinic #1's doctor] that the Appellant should commence a gradual return to work program. He indicated:

> "...It would be prudent for him to avoid certain activities as noted above as he commences the return to work program. It is my opinion [the Appellant] would do himself further harm if he decided to wait until his symptoms fully resolved before commencing a return to work program."

Counsel noted that [Appellant's doctor #1], in his letter dated June 3, 2009 had never suggested that the Appellant could not attempt a graduated return to work program.

MPIC did not receive further communication from the Appellant, whose benefits had been suspended, until February of 2010, when the Appellant's representative contacted MPIC and said that he wanted to try a return to work program.

In a letter dated February 8, 2010, [Appellant's representative] indicated that the Appellant was feeling much improved as a result of his treatment and had started to work for his employer part-time, on January 12, 2010.

> "[the Appellant] has provided me with new medical information which he finds quite encouraging. He informs about receiving acupuncture Treatment from [Appellant's doctor #4] of [text deleted]. He feels his condition is much improved as a result of this treatment. He started to work with [text deleted] for two hours 5 days a week as of 12 January 2010.
>
> He tells me he is positively motivated to make use of the gradual return to work program at this time."

Counsel for MPIC noted that the claim on the part of [Appellant's representative] that the Appellant had actually begun to work for two hours on some days was in direct contradiction of the Appellant's testimony at the hearing that he had not yet attempted to return to work after April 2009. However, in spite of this contradiction, counsel for MPIC took the position that he would uphold the position he had set out at the beginning of the hearing indicating that MPIC would provide IRI benefits to the Appellant from February 8, 2010 forward, on the basis that he

had expressed, through his representative, a willingness to attempt a return to work program as of that date.

Therefore, counsel for MPIC submitted that the suspension of the Appellant's IRI benefits upheld in the Internal Review Decision of April 14, 2011 should be upheld until February 8, 2010, and that the Internal Review Decision dated June 22, 2010 in regard to the Appellant's permanent impairment benefit should be upheld in that regard.

Discussion:

Lump sum indemnity for permanent impairment

127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500. and not more than $100,000. for the permanent impairment.

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

(c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;

(e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;

(f) without valid reason, prevents or delays recovery by his or her activities;

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to a permanent impairment award for disc herniation and radiculitis and that the suspension of his IRI benefits between May 3, 2009 and February 8, 2010 was not appropriate and valid as the Appellant had a valid reason for failing to participate in a graduated return to work program.

We have reviewed the documentary evidence on the Appellant's indexed file as well the testimony provided at the hearing and the submissions of counsel for MPIC and the Appellant's representative.

The panel has also reviewed the submission of counsel for MPIC that the Commission does not have jurisdiction to hear an appeal of the Appellant's permanent impairment award as the question was moot. We do not agree with counsel for MPIC that the Commission lacks jurisdiction because the Corporation has already paid the Appellant a permanent impairment award. In our view, the MPIC Act still provides the Appellant with the right to challenge the Internal Review decision which found that he was not entitled to any permanent impairment award as his injuries were not caused by the motor vehicle accident, as well as to challenge the amount of the award.

However, we do agree with counsel for MPIC that the Appellant has failed to provide any evidence and to show, on a balance of probabilities, that there are additional impairments which were not addressed by the case manager's decision of September 28, 2009. We agree with counsel for MPIC that the radiculitis claimed by the Appellant has already been included in the 6% assessment provided by the case manager and no evidence of further impairment was provided by the Appellant.

The permanent impairment award for the Appellant's disc herniation was supported by [Appellant's doctor #1]'s report of June 3, 2009, describing the Appellant's "chronic L5 and S1 radiculitis with mechanical and myofascial lumbosacral pain due to L4-L5 and L5-S1 disc herniations".

These findings were shown on a CT scan report dated October 6, 2008. [Appellant's doctor #1]'s findings were reviewed and confirmed by [MPIC's doctor], on July 7, 2009. He also noted [Appellant's doctor #3]'s finding of a right S1 lesion, in addition to the disc herniation noted and described by [Appellant's doctor #1].

The panel finds that MPIC has not produced sufficient evidence to support a change to the permanent impairment award which was assessed by the case manager on September 28, 2009. Although [MPIC's doctor] did make comments, in his reports dated July 6, 2009 and May 10, 2010 which questioned the origin of the documented disc abnormalities in the Appellant's lumbosacral spine, the Internal Review Officer, in her decision of June 22, 2010 ignored these comments and issued a decision which found it would be improper to issue a permanent impairment benefit as the file did not necessarily indicate that the Appellant's disc herniation was permanent.

The panel is of the view that none of the foregoing provides a sufficient basis to deny the Appellant a permanent impairment benefit for the documented injury noted by [Appellant's doctor #1] and [Appellant's doctor #3].

Accordingly, the Appellant's appeal is allowed such that the decision of the Internal Review Officer dated June 22, 2010 which found that the Appellant was not entitled to a permanent impairment benefit, is overturned.

A review of the Appellant's testimony and the documentation on his file leads the panel to the conclusion that the Appellant has met the onus upon him of showing that he had a valid reason

for not completing or continuing the graduated return to work program set out for him by [rehab clinic #1] and MPIC.

The Appellant, in his testimony, made multiple assertions that he was fine and worked hard before the motor vehicle accident, that he wanted to return to work and was motivated by the high wages he could receive. He also described the financial difficulties and frustrations he encountered as a result of his not working.

We find that the Appellant has established that during the period of his suspension he was not fit to return to work, even on a part-time basis.

In this regard, we have taken into consideration [Appellant's doctor #2]'s report of January 5, 2009 where he indicated:

> "As there has not been much improvement, I don't think he can return to work full time. His physiotherapist says it is a slow recovery. He cannot return to work until his range of motion improves and his pain is lessened."

[Appellant's doctor #1] then reported on February 23, 2009. He set out his findings and diagnosis, indicating that not only was the Appellant not fit to return to his pre-injury occupation, he was not fit to return to any other gainful employment, even sedentary or light.

> "Due to severe low back pain which is discogenic and neuropathic and right leg radiculopathy, he is not fit to return to his pre-injury occupation as a cleaner/janitor. He is not fit to return to any other gainful employment even sedentary or light job because he has significantly reduced sitting, standing and working tolerance."

[Appellant's doctor #1] recognized the degenerative nature of the problem and the contribution of the motor vehicle accident:

> "He did have occasional low back pain but this did not interfere with his activities of daily living and his job as a janitor/cleaner. CT Scan of the lumbar spine dated the 6th of October 2008 has shown at L4-L5 level posterolateral ridge osteophyte resulting in some degenerative narrowing of the left exit foramen indicating that he did have some early

> facet arthropathy and disc degeneration. This was further aggravated by the motor vehicle accident and can be further precipitated if he underwent aggressive manipulations of the spine. So in other words, the motor vehicle accident on any other subsequent manipulation aggravated his pre-existing asymptomatic facet joint arthroplasty and disc degeneration and causing disc herniations at L4-L5/L5-S1 level with severe radiculopathy ? L5 and S1 nerve roots."

In spite of this opinion, MPIC and [rehab clinic #1] encouraged the Appellant to attempt a gradual return to work program. As a result, the Appellant attended at work on April 7, 2009. He described the pain he experienced as a result, and his attendance at the [hospital] Emergency Room.

[Appellant's doctor #1] then reported again on June 3, 2009. He noted that the Appellant had developed chronic right L5 and S1 radiculitis with mechanical and myofascial lumbosacral pain and had been referred to [Appellant's doctor #5] for epidural steroid injections in the hope of reducing or resolving his radicular and discogenic pain. Until that pain was improved, even physiotherapy treatment would not be effective.

> "...The physiotherapy treatment will not be effective unless his radicular symptoms and signs improve with the treatment and then he will be able to participate in a conditioning and strengthening exercise program."

The opinions of the Appellant's caregivers regarding his level of functionality and lack of ability to work were later confirmed by MPIC's Health Care Services consultant, [MPIC's doctor] (although [MPIC's doctor] did caution against the Appellant delaying further attempts at a graduated return to work program).

A review of this documentation on the Appellant's indexed file demonstrates that the Appellant's physicians consistently confirmed that his pain and range of motion difficulties needed to be

addressed and improved before he could return to work or even fully participate in and benefit from exercise, conditioning and rehabilitation programs. However, in spite of this medical advice, MPIC continued to strongly advocate that the Appellant attempt a graduated return to work program. When this attempt failed, resulting in a trip to the [hospital] Emergency Room, the Appellant became more convinced that his symptoms and conditions prevented him from undertaking a graduated return to work program.

Accordingly, having reviewed this evidence and the submissions of counsel, the panel finds that, the Appellant has met the onus upon him of showing, on a balance of probabilities, that he had a valid reason for not completing or continuing the graduated return to work program set out for him by [rehab clinic #1] and MPIC and that his suspension for IRI benefits between May 3, 2009 and February 8, 2010 should be overturned. The Appellant's appeal is upheld and the decisions of the Internal Review Officer dated June 22, 2010 and April 14, 2011 are overturned as a result.

Dated at Winnipeg this 7th day of November, 2012.

LAURA DIAMOND

ROBERT MALAZDREWICH

LINDA NEWTON