Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-080

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Jacqueline Freedman** **Mr. Robert Malazdrewich**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr Morley Hoffman.**
HEARING DATE:	**October 29 and 30, 2012**
ISSUE(S):	**Whether the Appellant is entitled to Personal Injury Protection Plan ("PIPP") benefits related to the surgical treatment of her cervical spine.**
RELEVANT SECTIONS:	**Sections 70(1), 71(1) and 136(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 40/94.**

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

Reasons For Decision

The Appellant was injured in a motor vehicle accident on August 9, 2006. Following the accident she suffered from whiplash related injuries to her cervical and lumbar spine, as well as an outbreak of herpes zoster (shingles), dental injuries and complaints of symptoms to her bilateral wrists.

The Appellant had a history of previous work related neck problems, some back pain, chronic bilateral ear ache, hypertension, dizziness and intermittent visual problems, depression, irritable bowel syndrome, carpel tunnel syndrome and osteoarthritis in her hand.

Following accident related treatment by her physician, physiotherapists and a number of specialists, an MRI revealed bilateral mild diffuse disc bulging at C5-C6 and C6-C7 with foraminal narrowing at these levels and mild central spinal stenosis.

As a result, [Appellant's orthopedic surgeon], performed spinal surgery (double level arthroplasty of the C5-C6 and C6-C7) on September 30, 2010. The Appellant sought Personal Injury Protection Plan ("PIPP") benefits related to the cervical spinal surgery. On September 30, 2010, the Appellant's case manager wrote to her indicating that as it was the opinion of MPIC's Health Care Services Team that the surgical procedure to adjust the Appellant's disc protrusion was not medically required in the management of a medical condition causally related to the motor vehicle accident. As a result the case manager indicated that there was no coverage under PIPP, relating to surgery for the Appellant's cervical spine.

The Appellant sought an Internal Review of this decision.

On April 15, 2011, an Internal Review Officer for MPIC reviewed the medical and other information on the Appellant's file. The Internal Review Officer concluded that the Appellant had failed to establish, based on medical probability, that the medical evidence supported the likelihood that the Appellant's cervical condition and subsequent need for surgical intervention were related to the motor vehicle accident. She agreed with the opinion of MPIC's medical consultant and concluded that MPIC did not have an obligation to extend PIPP benefits relating to the double level arthroplasty of the cervical spine.

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

Evidence for the Appellant:

The Appellant testified at the hearing into her appeal. She described an active life prior to the motor vehicle accident that included gardening, yard work, raising two children, working around the house, playing volleyball, soccer and slow pitch.

She described an incident prior to the motor vehicle accident when she saw [Appellant's neurologist], in 2003. The Appellant explained that this was because she was having shoulder pain due to a change in the height of desks at her workplace. She has worked for [text deleted] for 25 years doing [text deleted]. This involves a lot of computer work, along with filing and invoicing at her desk.

She wore splints for a period to deal with the tightness in her shoulders and recovered.

The Appellant described the motor vehicle accident of August 9, 2006. She was hit from behind, but noted that because she saw the car approaching in her rear view mirror, she braced herself and turned her head, which resulted in a great deal of pain to her upon collision. She described her treatment following the accident at the [hospital]. Over the next several years she experienced symptoms of continuous pain, shingles, bronchitis, strep throat, issues with her vision, an inability to focus at work, tinnitus and fluid in her ears. The Appellant went for massage and chiropractic therapy as well as physiotherapy, which did seem to help her. However, she said that the pain was always there and felt like a weight on her shoulders all the time.

The Appellant saw many doctors and specialists, including an ENT specialist, a neuro-opthalmologist, a neurologist and an orthopaedic surgeon.

The Appellant also described difficulties with her ears, her vision and dizziness.

The Appellant described her physiotherapy treatment with [Appellant's physiotherapist]. She explained that when she discovered that MPIC would not be funding any more physiotherapy treatments, and reviewed a report where the physiotherapist said her condition was completely resolved, she had been shocked. The Appellant explained that her condition had not completely resolved and that her treatments had only stopped because MPIC had indicated that they wouldn't pay for them anymore. The pain was still there. The Appellant explained that she was still functioning, but that was about all she was doing. In addition to her myofascial pain she was still having problems with focusing her eyes, tinnitus and dizziness. She felt that she would start getting better with her treatment, but then, as soon as the frequency of treatments was decreased, she would start to get worse. She described this as a continual pattern of "moving two steps forwards and then two steps back". In addition, the Appellant kept getting sick, suffering from bronchitis, which seemed to make her neck even tighter.

Eventually, the Appellant went for an MRI and also saw [Appellant's orthopedic surgeon]. From [Appellant's orthopedic surgeon], the Appellant understood that she had a syndrome called **"**Barre-Lieou Syndrome**"**.

In the fall of 2008, [Appellant's orthopedic surgeon] recommended that the Appellant undergo surgery for the disc protrusions in her cervical spine. However, when he explained the risks involved with the surgery, the Appellant elected to defer the surgery and see if she could

improve without it. This did not occur and [Appellant's orthopedic surgeon] performed successful surgery on September 30, 2010. The Appellant described the immediate effect of the surgery. The next day she felt like there had been a weight lifted off her neck. She could see better, the pain in her ears and tinnitus disappeared, her vision improved and she did not have any dizziness. She had some neck pain for a few days, but this resolved quite quickly following the surgery.

The Appellant explained that she had none of these problems before the motor vehicle accident. She had suffered from a few headaches, as well as problems in her shoulders and neck, but these were related to her desk height at work and were resolved. Problems with tingling in her hands resulted from the problems she was having with her shoulder and neck.

Prior to the motor vehicle accident she would attend for chiropractic or massage therapy from time to time, but this was more for vocational problems she had with her lower back.

The Appellant also indicated that while she had sometimes suffered from bronchitis prior to the motor vehicle accident, it was much worse after the motor vehicle accident and she believed this was part of the Barre-Lieou Syndrome, affecting her chest and sinuses.

She also noted that although she suffered from some symptoms involving, in particular, severe tingling and coldness in her hands, these symptoms waxed and waned and she put off the surgery in spite of this discomfort, due to her fear of the risks involved.

The Appellant also provided medical reports from [Appellant's neurologist], two otolaryngologists, x-ray, CT and MRI reports, a neuro-opthalmologist's report and physiotherapy

reports. She provided opinions from her family physician, [Appellant's doctor #1] and from [Appellant's orthopedic surgeon], who are both of the opinion that the motor vehicle accident aggravated and accelerated the underlying condition of the Appellant's neck. Although the Appellant suffered from degenerative changes, her current symptoms began after the motor vehicle accident, which aggravated the prior problem. It was [Appellant's orthopedic surgeon]'s opinion that there was a 50-70 percent causality appropriated to the motor vehicle accident and the need for cervical spinal surgery.

Submission for the Appellant

The Appellant's representative submitted that MPIC's Health Care Consultant, [MPIC's doctor #1], had erred in his review by concluding it was not medically probable that the motor vehicle accident contributed in any way to the symptoms the Appellant was reporting in 2009 and 2010. It was important to note that the surgery which the Appellant underwent was suggested in 2008, only five months after the symptoms she suffered from the motor vehicle accident had "supposedly resolved".

In this regard it was important to look at the [Appellant's physiotherapist]'s report of August 16, 2007 where he noted:

> "Response to therapy, overall, has been inconsistent and there seems to be more pre-existing issues than first thought. The whole body appears involved, to varying degrees, with tension. The MVA appears to have come at the end of a long continuum of life stress and so her case is not simply a matter of treating the 'whiplash'".

Although the physiotherapist anticipated a November 15, 2007 end to treatment, by December 3, 2007, with treatment winding down, she was still experiencing symptoms. The Appellant's representative also questioned why the physiotherapist had such clear plans to send a discharge

report regarding the Appellant, after a reassessment had been done, without waiting for the results of the reassessment before planning discharge.

It was submitted that the Appellant's condition continued to ebb and flow, her condition fluctuated and did not resolve, and this situation continued both before and after her discharge from physiotherapy treatment. Her representative described these as ongoing, recurrent, intermittent symptoms.

The Appellant's representative also rejected [MPIC's doctor #1]'s reliance on any pre-existing condition. He noted that [Appellant's orthopedic surgeon] had a chance to examine the Appellant as well as operate on her and that he had opined that her symptoms were related to the motor vehicle accident on the basis on a 70 percent connection. [Appellant's doctor #1], her primary care giver, also agreed that the motor vehicle accident had aggravated the Appellant's condition. He submitted that both these doctors were in the best position to opine regarding the Appellant's condition and its causes.

It was further submitted, as suggested by [Appellant's physiotherapist], that the physiotherapy treatments which the Appellant underwent delayed the severity of the onset of the symptoms of her disc protrusion. However, until [Appellant's orthopedic surgeon] performed the surgery, there was no lasting relief.

> "Three and one half months later, the craniofacial symptoms began to return and she initiated a recommencement of therapy before the symptoms could become re-established. I began the same therapy as before. One month later she began mentioning neck issues. One additional week later she had bronchitis again. One month after bronchitis began she began reporting left shoulder and thumb pain.
>
> In a report to [text deleted] December 29, 2008 I attempted to explain that in treating the craniofacial symptoms, the techniques employed involved the upper thoracic region, shoulder girdles and cervical spine as well as the cranium as 'no body part is an island

> unto itself', everything is interconnected. Because treatment would have involved the lower cervical levels, it may have been delaying the revelation of the C6-7 disc problem until she was independent for the 3 ½ months. But, treatment for the returning craniofacial symptoms had already been underway for at least 2 months before left shoulder and thumb pain being mentioned and the former were the same symptoms she was having soon after her MVA, persisting for months before beginning Myofascial Release therapy".

It was submitted that a review of chart notes in the Appellant's medical file showed that she continued to have pain and symptoms after her discharge from physiotherapy care.

It was also submitted that [MPIC's doctor #1] erred in suggesting that because the Appellant didn't report severe neck pain immediately following the motor vehicle accident, this shows that there was not a radiculopathy injury from the motor vehicle accident as she would have reported that pain immediately. However, an intake report from the [hospital] shows the Appellant complained of aching neck, lower back pain and tender upper neck following the motor vehicle accident.

[MPIC's doctor #1]'s view that the Appellant's injuries were merely soft tissue failed to recognize that the trauma which the Appellant had suffered was of sufficient force to injure her teeth, and as such, could definitely be considered sufficient to injure the muscles and tendons surrounding the disc in her back.

Further, [MPIC's dentist] (MPIC's Dental Consultant who approved treatment following the motor vehicle accident), and [MPIC's doctor #2] (of MPIC's Health Care Team) both recognized the connection between the Appellant's injuries and the motor vehicle accident.

Then, numerous specialists treating the Appellant recognized the connection between the Appellant's symptoms and the motor vehicle accident. In particular [Appellant's doctor #1] and

[Appellant's orthopedic surgeon] were quite clear in this regard as [Appellant's orthopedic surgeon] noted:

> "...however it is quite clear that this patient had significant neck problems prior to the accident in 2006. However there is no doubt that the accident aggravated her ongoing symptoms and accelerated the need for surgery...."

The Appellant's representative submitted that even taking a pre-existing neck condition into account, there was no evidence of disc bulging before the motor vehicle accident. Then, the first MRI following the motor vehicle accident showed the disc bulging. Further, had the Appellant simply suffered from soft tissue injuries, her condition should have resolved within three to four weeks. Yet she was not discharged from physiotherapy for a year and a half, returning for treatment approximately three and a half months later with the same symptoms that she had been presenting for one and a half years following the motor vehicle accident. As a result, the same treatment then resumed. The Appellant was known to be asymptomatic before the motor vehicle accident and definitely symptomatic after the motor vehicle accident, until she had surgery. A slight two to three month period where she was not pain free but was not receiving treatment does not assist MPIC in establishing that her symptoms were not a result of the motor vehicle accident.

It was submitted that the totality of the evidence shows that on a balance of probabilities the motor vehicle accident contributed to worsen the Appellant's asymptomatic pre-existing neck problems. The trauma made an asymptomatic problem symptomatic and necessitated surgery.

It was submitted that the Appellant's appeal should be allowed and the decision of Internal Review Officer overturned.

Evidence for MPIC:

MPIC provided medical reports from MPIC's Health Care Services Team which indicated that it was not medically probable that the motor vehicle accident contributed in any way to the symptoms the Appellant was reporting in her neck in 2009 and 2010, for which [Appellant's orthopedic surgeon] recommended surgical intervention.

[MPIC's doctor #1], MPIC's Health Care Consultant, testified at the hearing into the Appellant's appeal. The parties agreed that [MPIC's doctor #1] was qualified as an expert in physical medicine and forensic review.

[MPIC's doctor #1] described the reviews which he had undertaken in regards to the Appellant's file, and explained his understanding of the surgery which the Appellant had undergone to replace two discs in her cervical spine with artificial discs, in order to restore normal alignment.

[MPIC's doctor #1] indicated that he had reviewed the medical information on the Appellant's file, including the reports from [Appellant's doctor #1] and [Appellant's orthopedic surgeon] and understood that [Appellant's orthopedic surgeon] had no doubt that the motor vehicle accident aggravated or accelerated the Appellant's symptoms, leading to the need for surgery, and that 70 percent of the symptoms related to her motor vehicle accident injuries.

However, [MPIC's doctor #1] explained that he did not agree with this view. He indicated that in his opinion, [Appellant's orthopedic surgeon] had not seen all of the reports on the Appellant's file, as he did not make reference to them and explained that there was no test or formula which could be put into place to determine what percentage of the Appellant's symptoms were motor vehicle accident related.

[MPIC's doctor #1] differentiated between the Appellant's cervical spondylosis and the whiplash injury she suffered secondary to the motor vehicle accident. In his view, these were two different problems with two different causes and the motor vehicle accident did not factor into her spondylosis.

[MPIC's doctor #1] noted the significant degenerative changes already apparent on the x-rays taken of the Appellant's neck and back. In his view, these significantly pre-dated the motor vehicle accident and there was no radiological evidence that this pre-existing condition was enhanced by the motor vehicle accident. There were no significant changes in cervical findings.

[MPIC's doctor #1] noted that [Appellant's orthopedic surgeon] was not involved in the Appellant's care prior to the motor vehicle accident and with no such evidence of radiological acceleration, it is difficult to understand how [Appellant's orthopedic surgeon] could take the position that the motor vehicle accident caused an acceleration in clinical findings.

[MPIC's doctor #1] explained that the Barre-Lieou Syndrome that the Appellant described was not well recognized in the literature and the treatment for it (usually Prolotherapy) remained quite controversial. In his view, this was not a recognized condition and [MPIC's doctor #1] did not understand why [Appellant's orthopedic surgeon] had referenced this in his opinions, when his initial diagnosis related to her cervical spine.

Nor could [MPIC's doctor #1] understand how [Appellant's orthopedic surgeon] could take the position that the motor vehicle accident contributed to her symptoms on the basis of 70 percent. He indicated that 70 percent was a pretty significant contribution and the medical evidence only

showed that the Appellant suffered a mild surgical cervical sprain in the motor vehicle accident. She didn't report neck symptoms to the attendant, and at the hospital was diagnosed with only a minor strain and no significant musculoskeletal tear or damage.

Further, a review of the file indicated that the Appellant's neck symptoms from the motor vehicle accident had resolved by January 2008, leading to the Appellant's discharge from physiotherapy not long after. When she returned to physiotherapy in April of 2008, the Appellant then began complaining of symptoms which had a more radicular type of pattern. [MPIC's doctor #1] did not believe that this was connected to the motor vehicle accident.

This recovery, combined with the Appellant's pre-motor vehicle history, lack of demonstrable radiological evidence and complaints of significant neck injury in the period immediately post-motor vehicle accident, all contributed to [MPIC's doctor #1]'s impression that the Appellant's neck condition and need for cervical surgery was a result of her pre-existing degenerative condition and was not connected to injuries sustained in the motor vehicle accident.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant had failed to meet the onus upon her of showing, on a balance of probabilities, that her spinal surgery related to the motor vehicle accident which occurred in August of 2006. Counsel maintained that the Commission should prefer the evidence of [MPIC's doctor #1] over the evidence of [Appellant's orthopedic surgeon], in spite of the fact that [the latter] was the Appellant's orthopaedic surgeon. This was because there was no evidence that [Appellant's orthopedic surgeon] had reviewed the Appellant's medical file and completed a forensic review of causation when he provided his view that the Appellant's symptoms, on a balance of 70 percent, related to the motor vehicle accident. Although he is an

orthopaedic surgeon, he is not a forensic expert and has failed to provide a rationale for his conclusions.

Although counsel for MPIC was unable to explain why neither the Internal Review Officer or MPIC's Health Care Team had requested this information from [Appellant's orthopedic surgeon], he maintained that [Appellant's orthopedic surgeon]'s failure to provide a more detailed explanation including what he was looking at, what tests were done etc., should lead the Commission to give less weight to his opinion than to that of [MPIC's doctor #1]. The surgery and its success did not tell the Commission anything about causation. As [MPIC's doctor #1] had indicated, people with neck problems, even those who have no symptoms, can have flare ups for various reasons, even simple ones and this does not require a trauma. Most people with neck problems don't even know what triggered it.

The Appellant suffered from minor motor vehicle accident whiplash symptoms. The evidence suggests she merely exacerbated a pre-existing neck problem and there were minimal clinical findings and an absence of radiological findings when she was objectively assessed.

MPIC's responsibility was limited to addressing conditions which were causally related to conditions arising out of the motor vehicle accident. She was provided with therapy, for an extended period of time. This accommodated her pre-existing condition, her work related tasks, her recurring bronchitis and her sinus infections. Then, with time, her exacerbation resolved and she returned to her pre-accident state. This was documented when the physiotherapist Juliak outlined her improvement and discharged her from care by January 2008.

[Appellant's doctor #1]'s notes from this time period show that a neurological exam was negative and the Appellant did not have abnormal spine or range of motion difficulties with her hips. There was no report of cervical symptoms at that time. Even in March 2008, there was no report of neck symptoms in the Appellant's indexed file. This continued to April 17, 2008 when she sought treatment for an ear infection and then May 13, 2008 when no neck symptoms were reported to her doctor.

Counsel for MPIC submitted that the Appellant had significant neck problems before the motor vehicle accident. An x-ray in August of 2006 showed signs of osteoarthritis, and this was consistent with the radiological complaints which she had presented to [Appellant's neurologist] in 2003. Further, the Appellant had a history of difficulty with work related neck problems dating back to May 2006. This pre-existing condition was not worsened by the motor vehicle accident. Her cervical problems may well have been triggered by non-motor vehicle issues such as working every day, coughing, or just everyday life.

Counsel paid particular attention to the symptoms of radiculopathy which the Appellant suffered. He noted that these were very different symptoms than the symptoms that the Appellant complained of following the motor vehicle accident. Looking at the Appellant's entire file, [MPIC's doctor #1] concluded that any condition arising from the motor vehicle accident had resolved. The problems with the Appellant's pre-existing disc problem and its worsening in 2008, following her discharge from physiotherapy, were not connected to the motor vehicle accident, as the symptoms resulting from this condition had already resolved. Further, it was difficult to understand how [Appellant's physiotherapist] could comment that the physiotherapy treatment had masked or delayed the symptoms presentation of the Appellant's disc problem. The disc symptoms did not really show up until July 2008 and the Appellant had been discharged

from physiotherapy in January 2008, so it is difficult to believe that successful treatment in January would have masked or delayed these symptoms for seven months.

Counsel also submitted that the Appellant's primary care physician, [Appellant's doctor #1], did not do a full review of the file as [MPIC's doctor #1] had.

Counsel also noted that the Barre-Lieou Syndrome raised by the Appellant was not really relevant to the issues at hand. In his view, it did not matter by what name the Appellant's symptoms were called. Rather, the issue is whether her spinal surgery related to the motor vehicle accident and whether the cluster of symptoms that this syndrome refers to (tinnitus, dizziness, chronic complaints) had been complained of prior to the motor vehicle accident. Nor was there any evidence to suggest that the Appellant's bouts of bronchitis were related to the motor vehicle accident.

Although the Appellant submitted that all of her problems were related to the motor vehicle accident and were all cured by the surgery, the Commission should focus upon the Appellant's neck symptoms, which the surgery addressed and whether these were connected to the motor vehicle accident. At the end of the day, counsel submitted that the Appellant had failed to meet the onus of establishing that the Internal Review Officer was in error. The Appellant had a pre-existing neck condition which caused her to require neck surgery, long after any symptoms caused by the motor vehicle accident had subsided.

Discussion:

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;

Application of Part 2

71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

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.

Manitoba Regulation 40/94 provides:

Medical or paramedical care
5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

(a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician;
(b) when care is medically required and dispensed outside the province by a person authorized by the law of the place in which the care is dispensed, if the cost of the care

> would be reimbursed under *The Health Services Insurance Act* if the care were dispensed in Manitoba.

The onus is on the Appellant to show, on a balance of probabilities that she is entitled to PIPP benefits related to the surgical treatment of her cervical spine, as a result of the motor vehicle accident.

The panel has reviewed the testimony of the Appellant and of [MPIC's doctor #1], as well as the documentary evidence on the Appellant's indexed file, and the submissions of counsel for MPIC and the Appellant's representative.

The panel found that the Appellant testified in a straightforward manner. MPIC did not raise any issues regarding her credibility and the panel has accepted her evidence that since the motor vehicle accident, she was almost never without pain and that this pain had not troubled her prior to the motor vehicle accident.

The Commission heard evidence regarding pre-existing neck problems which the Appellant suffered. As well, an x-ray taken after the motor vehicle accident showed radiological evidence of a pre-existing osteoarthritic neck condition.

> "The cervical vertebrae are normal in alignment. There is OA of the mid and lower cervical facet joints and at the vertebral joints. There is narrowing of the left neural foramina at C5,6 and C6,7 due to osteophytes arising from the uncovertebral joints. The right neural foramina are not well assessed due to positioning. No other abnormality is seen."

The Appellant suffered from whiplash symptoms following the motor vehicle accident and an exacerbation of her pre-existing neck problems. MPIC provided treatment, but her improvement

was inconsistent. The bulk of the evidence established that the Appellant's condition fluctuated and, as her physiotherapist noted on October 3, 2007:

> "Degree of improvement, frankly, has been disappointing. At times her craniofacial symptoms are much reduced and then, rather suddenly, reappear. Persistent coughing secondary to bronchitis late summer was definitely provoking myofasical trigger points in the anterior neck's soft tissue and it seemed two steps forward were being matched by two steps backward."

Other intervening factors also delayed the Appellant's recovery and affected the success of the treatment. These factors included the Appellant's work schedule and cough and sinus problems. There was then a period in time when some of these factors, which had interfered with treatment, abated somewhat. The Appellant made significant progress with her treatment and was discharged from physiotherapy.

The parties do not agree regarding the characterization of the Appellant's condition at this time. MPIC takes the position that the Appellant was recovered and her condition was resolved. The Appellant takes the position that she was still experiencing pain and symptoms, still attending doctors and it was just a case of the waxing and waning of her symptoms, which had characterized her treatment and condition throughout. It was not a resolution of her condition.

The Commission notes that the Appellant did return for treatment after approximately three months, as a result of a worsening of her symptoms. The Commission agrees with the Appellant that she did not in fact have a resolution of her symptoms at this point in time, and further evidence established that she did not have such a resolution until she had the surgery performed by [Appellant's orthopedic surgeon]. She was referred to [Appellant's orthopedic surgeon] in early October 2008, and by November 12, 2008 [Appellant's orthopedic surgeon] reported and recommended surgery. This surgery was deferred at the time, in pursuit of other less invasive,

potentially less risky treatment. However, in 2010 the Appellant decided that surgery would be necessary.

As early as November 2008, [Appellant's orthopedic surgeon] was firmly of the opinion that the motor vehicle accident had accelerated the need for surgery.

However, [MPIC's doctor #1], with MPIC's Health Care Services Team took a different view. He reviewed all of the medical evidence on the Appellant's file, and in particular the reports of [Appellant's doctor #1] and [Appellant's orthopedic surgeon]. His most recent opinion dated March 29, 2011 was echoed in his testimony before the Commission. [MPIC's doctor #1] was of the view:

1. "[The Appellant] had significant cervical problems prior to the incident in question;
2. The medical evidence does not indicate [the Appellant]'s pre-existing neck problems were enhanced by the incident in question;
3. The medical evidence does not support the conclusion that [the Appellant] has what is referred to as Barre-Lieou syndrome and that this syndrome developed as a direct result of the incident in question. I am unaware of any scientific literature that validates the syndrome as an actual medical entity based on known pathophysiological processes. It is a term used to describe an individual with multiple symptoms that escape clinical and radiological identification;
4. The medical evidence does not support the conclusion that the motor vehicle incident contributed to 70% of [the Appellant]'s present cervical spine condition.
5. The documents do not contain information indicating diagnostic tests performed to assess [the Appellant]'s cervical spine identified a rapid deterioration in objective findings that could only be the result of the incident in question;
6. Based on documentation of minor symptoms involving her neck subsequent to the incident in question, documentation of significant cervical problems prior to the incident in question and documentation indicating that with the treatments she received subsequent to the incident in question, her symptoms had resolved and her examination was within normal limits as of January 24, 2008, it is not medically probable the motor vehicle incident contributed in any way to the symptoms she reported in 2009 and 2010 for which [Appellant's orthopedic surgeon] recommended surgical interventions."

The Commission has carefully considered [MPIC's doctor #1]'s opinion and weighed it against the evidence provided by [Appellant's orthopedic surgeon], [Appellant's doctor #1], [Appellant's doctor #2], [Appellant's neuro-opthamologist], and even [MPIC's dentist] and [MPIC's doctor #2].

In earlier reviews of the Appellant's file, [MPIC's dentist] found a connection between damage to the Appellant's teeth and the motor vehicle accident.

[MPIC's doctor #2] reviewed the file on May 18, 2007, concluding that medication prescribed for the Appellant was likely prescribed to address muscular pain and post motor vehicle accident sequelae.

[Appellant's doctor #2] examined the Appellant and reported on June 11, 2007 that:

> "In reply to your most recent letter, my current diagnosis regarding [the Appellant] would be myofacial pain syndrome following an MVA...
>
> Currently, regarding pre-existing or unrelated conditions, she is known with mild to moderate osteoarthritis of her neck and does have depression and anxiety. I do agree that this may impact on her recovery although I do not believe it to be responsible for ongoing symptoms."

[Appellant's neuro-opthamologist], reported on November 5, 2007, attributing the Appellant's dizziness as being secondary to spasm of the muscles in her neck. He stated:

> "Her symptoms are related to her motor vehicle accident of August 6, 2006. I understand from her history that she received injury to her cervical spine and low back. This muscle injury is still present and causing her symptoms of dizziness."

On January 3, 2008 [MPIC's doctor #2] reviewed the Appellant's continued complaints of shoulder tightness, headaches, ear pain, dizziness, jaw pain and nocturnal hand tingling, along with other complaints and concluded:

1. "Does the medical documentation support that the ongoing presentation relates to the motor vehicle collision of August 2006? Chronological review notes ongoing report of cervical and sternocleidomastoid muscular pain which is temporally related to the circumstances of the August 2006 motor vehicle collision. The report of intermittent dizziness has been diagnosed by both [Appellant's doctor #3] and [Appellant's neuro-opthamologist] as being carvicogenic in origin as opposed to being related to the vestibular system. This also temporarally relates to the collision.

[Appellant's doctor #1] provided a report dated September 7, 2010. He stated:

> "....She had x-rays taken showing cervical and lumbar spondylosis at levels C5-C6, C6-C7 as well as level L4-L5. These conditions were known prior to the accident and she has had ongoing problems with lower mechanical back pain since 1997 but has never had any problems with her neck prior to the accident...
> She is currently pending surgery of these areas through [Appellant's orthopedic surgeon], in [text deleted] on September 30, 2010. Both myself and him feel that even though she suffered from degenerative changes to these areas, that her current symptoms came on after the accident and that the accident aggravated the previous problem...
>
> In my opinion, based on the balance of probability, the motor vehicle accident caused the injuries sustained by [the Appellant], including the bulging discs in her neck, causing her ongoing symptoms. It is also my opinion that she requires ongoing supportive physiotherapy in order to reduce her pain, improve her quality of life and that this supportive physiotherapy has also allowed her to continue working full time at her present job."

[Appellant's orthopedic surgeon] reported on November 12, 2008. He stated:

> "...However it is quite clear that this patient had significant neck problems prior to the accident in 2006. However there is no doubt that the accident aggravated her ongoing symptoms and accelerated the need for surgery. At this stage I do believe that she will need surgery as this is not improving and she has significant Barre's syndrome...."

On April 8, 2009, [Appellant's orthopedic surgeon] indicated:

> "...As mentioned in my previous letter to you there is no doubt that the underlying condition of the neck aggravated the accident, but there is also no doubt that the accident aggravated the underlying condition. Furthermore the accident certainly accelerated the risk for surgery. I would suggest that there is about a 50/50 apportionment for blame on the underlying condition and the present accident..."

The Appellant referred the Commission to its decision in [text deleted] AC-07-01. We have noted comments made by the Commission in that case comparing the weight to be accorded

evidence from the forensic reviewers and from the Appellant's caregivers, and in particular, expert caregivers such as [Appellant's orthopedic surgeon].

> "...[Appellant's orthopedic surgeon], unlike [text deleted], is a specialist in spinal surgery and has had enormous experience in conducting such surgery, both in [text deleted] and in [text deleted]. [Appellant's orthopedic surgeon], unlike [text deleted], did have the opportunity of personally examining the Appellant, from obtaining his medical history and assessing his credibility. For these reasons the Commission gives greater weight to the medical opinion of [Appellant's orthopedic surgeon] than it does to the opinion of [text deleted]...."

Similarly, in the Appellant's case, the panel must weigh the evidence of the doctors and caregivers listed above against [MPIC's doctor #1]'s forensic assessment. We recognize that [Appellant's Doctor #1] and [Appellant's orthopedic surgeon] had the opportunity to personally examine and treat the Appellant, assessing her credibility and obtaining her medical history. They were consistently clear in their view that there was a causal connection between the Appellant's surgery and the motor vehicle accident, and the panel has given greater weight to these medical opinions than to the opinion of MPIC's Health Care Consultant. [Appellant's orthopedic surgeon]'s expertise in the area should also be afforded significant weight.

The Commission notes that it is not necessary for it to decide whether the Appellant's neck injury should be characterized as part of a Barre-Lieou Syndrome**.** As noted by the court in *Athey v. Leonati* (1996), 3 S.C.R. 458, causation need not be determined by scientific presicision, but rather is essentially a practical question of fact which can best be answered by ordinary common sense.

In this appeal, the panel finds that the Appellant has met the onus upon her of providing, on the basis of the weight and bulk of medical evidence on her file, ample support for the contention

that the Appellant had a pre-existing, asymptomatic (at the time of the motor vehicle accident) neck related condition which the motor vehicle accident made symptomatic and accelerated.

[Appellant's orthopedic surgeon] reported on January 11, 2011 and indicated:

> "...The old question is resurfacing again, what is the contribution of the MVA on her symptoms. Although she has cervical spondylosis she did not have all the symptoms until after the accident. There is therefore no doubt, as in my original letter of 2008, that the accident aggravated and accelerated the need for surgery and her symptoms as well. I would suggest there is a 70% causality appropriated to the accident and 30% to the underlying condition..."

We find that the need for surgery was caused by this acceleration and as a result, we conclude that surgical treatment of the Appellant's cervical spine was related to injuries sustained by the Appellant in the motor vehicle accident.

Accordingly, the decision of the Internal Review Officer dated April 15, 2011 is overturned and the Appellant's appeal allowed. The Appellant is entitled to PIPP benefits related to the surgical treatment of her cervical spine and the matter of her entitlement to these benefits will be referred back to the Appellant's case manager for determination.

Dated at Winnipeg this 4th day of December, 2012.

LAURA DIAMOND

JACQUELINE FREEDMAN

ROBERT MALAZDREWICH