Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-208

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Mary Lynn Brooks** **Mr. Guy Joubert**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Officer, and by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**June 15, 2011, September 23, 2011, September 24, 2012, November 22 and 23, 2012**
ISSUE(S):	**1. Whether the Appellant is entitled to a Permanent Impairment Award.** **2. Whether the Appellant is entitled to Chiropractic and Athletic Therapy treatments.** **3. Extension of time for late filing of the Application for Review.**
RELEVANT SECTIONS:	**Sections 70(1), 127(1), 172(1), 172(2), and 184(1)(b) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) 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 involved in a motor vehicle accident on August 21, 1998. The Appellant was operating a motor vehicle and while stopped at a red light was hit by a truck from behind causing a collision with the vehicle in front of him.

The appeal in respect of the Appellant's claim commenced with the motor vehicle accident on August 21, 1998 and was completed 14 years later when the Commission concluded its hearing on November 23, 2012. In order to determine the issues under appeal it was necessary for the Commission to consider the testimony of the Appellant, numerous medical reports, numerous decisions by MPIC and several Case Conferences held by the Commission to determine procedural issues.

The Appellant saw his personal physician, [Appellant's doctor #1], on August 24, 1998, three days after the motor vehicle accident. In his report to MPIC dated December 15, 1998, [Appellant's doctor #1] reported that the Appellant had pain in his neck and upper back following the accident and he was taken to the [hospital #1] Emergency Room. [Appellant's doctor #1] obtained a copy of the Emergency Room records which confirmed the diagnosis of neck and back strain.

The Appellant reported to [Appellant's doctor #1] that he had increased pain and stiffness to his neck, pain in the lower back and occasional headaches.

The physiotherapist, [Appellant's physiotherapist #1], who treated the Appellant provided a report to MPIC on August 28, 1998 and stated her findings as follows:

> "1. Ltd ROM C-T spine, flex, bilat sflex
> 2. Pain neck – back, headaches
> 3. Paravetebral muscle spasm & joint restriction lumbar spine"
> (Underlining added)

In her report, she diagnosed the Appellant as having "acute whiplash muscle strain C-T spine". (Underlining added)

[Appellant's doctor #1] provided MPIC with an Initial Health Care Report dated September 8, 1998 wherein he diagnosed "whiplash injury mechanism cx muscle neck strain". (Underlining added)

At the December 7, 1998 visit, the Appellant reported to [Appellant's doctor #1] that:

1. He had been going to physiotherapy every second day for at least 45 minutes of phyiso and 30 more minutes of massage.
2. He was not able to drive for any length of time and he was having trouble sleeping.
3. His mood and spirits are quite good some days and on some days he feels quite down.
4. When he is active after three to four hours he gets a burning discomfort in his neck.
5. The neck pain adversely affected his ability to work.

[Appellant's doctor #1] advised MPIC in his December 7, 1998 report that on November 3, 1998 he referred the Appellant to [Appellant's physiatrist #1], a physiatrist, for an assessment. [Appellant's doctor #1] concluded his report by stating:

> "I am at a loss to explain why he has had so much discomfort. His reflexes are equal bilaterally and there is no evidence of neurological damage (his brachial radialis, biceps and triceps and reflexes were all 2+ bilaterally on December 7, 1998)." (Underlining added)

[Appellant's doctor #1] provided a report to MPIC's case manager dated December 15, 1998 and indicated that he examined the Appellant and stated:

> "The examination at that time revealed normal cranial nerves, a nontender C-spine to palpation, but obvious decreased range of motion of the cervical spine in all directions. Point tenderness to palpation was noted in his thoracic spine in all directions. Point tenderness to palpation was noted in his thoracic spine around the T3-T4 level, but there were no other abnormalities. Because of the obvious pain and stiffness with a decreased range of motion of his cervical spine, a diagnosis of muscle strain was made, seemingly

> related to a whiplash-type mechanism of injury. He was started on Flexerol 10 mg tid and referred to physiotherapy." (Underlining added)

In his report [Appellant's doctor #1] indicated that he continued to see the Appellant on a regular basis and the Appellant continued to complain of ongoing difficulties relating to his job, sleeping, and activities.

[Appellant's doctor #1] also reported to MPIC that he saw the Appellant on September 2, 1998, October 15, 1998, November 2, 1998, December 7, 1998 and the Appellant regularly complained of ongoing neck discomfort.

The Appellant had been attending treatment with [Appellant's chiropractor], chiropractor, who reported on February 1, 1999, that the Appellant's symptoms at that time were "burning pain in lower neck and upper back, front neck muscle pain, left mid back pain, right arm weakness with wrist pain". [Appellant's chiropractor's] diagnosis was C5-6-7 sprain and strain, T8-T9 rib sprain-strain. [Appellant's chiropractor] provided a report to MPIC indicating the number of treatments he had with the Appellant as follows:

> 1999:
> Jan. 8, 11, 15, 18, 22, 29 1999
> Feb. 1, 5, 9, 12, 15, 17, 19, 22, 24, 26 1999
> March 1, 3, 8, 12, 19, 26, 29 1999
> April 1, 6, 12 1999
> May 28 1999
> June 1, 14, 17, 22, 25, 30 1999
> July 5, 8, 13, 20, 22, 28 1999
> Aug. 3, 12, 16, 19, 23, 26, 31 1999
> Sept. 2, 7, 10, 14, 17, 21, 28 1999
> Oct. 1, 5, 7, 12, 19, 26, 29 1999
> Nov. 2, 5, 12, 16, 19 1999
> Dec. 30 1999
>
> 2002:
> Oct. 21, 15, 19 2002
> Nov. 1, 5, 8, 12, 15, 19, 22, 26 2002

Dec. 3, 6, 10, 12, 16 2002

2003:
Feb. 12, 17, 21, 25, 27 2003
March 3, 6, 11, 13, 18 2003
June 9, 12, 17, 20, 24, 26 2003
July 7, 10, 15, 17 2003
Aug. 5, 11, 18, 21, 25, 27 2003
Sept. 3, 8, 11, 15, 18, 22, 25, 30 2003
Oct. 3, 8, 16, 23 2003
Nov. 19, 25 2003
Dec. 1 2003

2004:
Jan. 6, 8, 12, 16, 19, 23, 27, 30 2004

Please be advised [the Appellant] did see [Appellant's chiropractor] on the following dates which he himself paid for. Jan. 5 2000, March 17, 22, 27, 2000, April 3, 10, 17, 24, 25 2000, May 1, 8, 15 2000, July 25, 27 2000------June 18, 21, 6, 28 2001---------March 11, 14, 19, 27 2002, April 3, 8, 15, 22 2002."

MPIC requested that the Appellant attend a third party musculoskeletal examination by physiotherapist, [independent physiotherapist]. [Independent physiotherapist], in his report of February 24, 1999, set out the following complaints of the Appellant:

"**Current Complaints:**

1. [The Appellant] notes difficulty finding a comfortable position to sleep. He will waken two to three times per night and feels fatigued in the morning.

2. A burning sensation radiating from the right neck to shoulder girdle. This sensation is constant with variable intensity. It is aggravated by driving and prolonged sitting of more than 30 to 60 minutes. Flexing to demonstrate vacuuming also irritates the area. The burning/tightness increases as the day progresses. He can obtain partial relief by application of a warm bean bag before bed and occasionally during the day...

Mood

When questioned regarding his mood, [the Appellant] noted it was initially bad in that he was depressed for the first three and a half months. He notes his mood is now better and he is less irritable." (Underlining added)

[Independent physiotherapist] concluded his report by stating that the Appellant had a complaint of sleep disturbance and an ongoing burning sensation in the right neck and upper shoulder region.

The Appellant was referred to [Appellant's physiatrist #1], a physiatrist at the [hospital #2]. [Appellant's physiatrist #1] saw the Appellant on February 22, 1999 with complaints of burning neck pain, sleep disturbances and reduced functional capabilities since the motor vehicle accident of August 20, 1998. [Appellant's physiatrist #1] obtained a medical history of the Appellant and conducted a physical examination and concluded:

> "Clinically [the Appellant] has cervical pain syndrome and strain of the interspinous ligaments with the active trigger points of the right trapezius and sternocleidomastoid muscles. He has weakness of the neck and shoulder girdle muscles. I would like to rule out instability of the cervical spines." (Underlining added)

The first report of the Appellant's right shoulder problems is at [Appellant's physiotherapist #2's] report of March 9, 1999. [Appellant's physiatrist #2] summarized this report to MPIC in his own report of September 8, 2000:

> "This report is somewhat difficult to read due to a combination of the clarity of the handwriting and the quality of the photocopy. The range of motion of the right shoulder is noted to be decreased in internal rotation and abduction with pain on resisted abduction and internal rotation and flexion. The cervical range is reported to be grossly full. The diagnosis is reported as rotator cuff tendonitis and myofascial pain upper trapezius." (Underlining added)

[Appellant's doctor #1], the Appellant's family physician, received a copy of [independent physiotherapist's] report and wrote to the case manager on March 9, 1999 and indicated that his finding did not differ from that of [independent physiotherapist] and stated:

1. "...I am at a lose *(sic)* to explain both the ongoing discomfort and the severity of ongoing discomfort. I have not yet received a letter from [Appellant's physiatrist #1] (physical medicine and rehabilitation). I've also taken the liberty of referring this patient to [Appellant's physiatrist #2] because of the ongoing discomfort."

2. The Appellant had been going regularly to physiotherapy and had reached a point where it did not seem to help any further.

3. "I am also concerned about a depression (as it would be common in anybody with an ongoing discomfort), but the patient does not wish continuing Amitriptyline. On March 1, 1999, I started him on Luvox, 50 mg a day for one month, and will follow-up at that point." (Underlining added)

[Appellant's doctor #1] concluded his letter by stating:

> "1. This gentleman says he cannot work because it is just too painful and the burning in his muscles is too uncomfortable.
> 2. That there are some objective findings, as outlined in the physiotherapist's report in terms of decreased range of motion, but otherwise the exam was unremarkable.
>
> Obviously, I am waiting for further information from specialists to help me with this difficult case." (Underlining added)

In a report to MPIC's case manager of March 29, 1999 [Appellant's doctor #1] stated:

> "...I am at a loss to describe his on-going pain and discomfort. He is certainly not able to do any "heavy work" which seems to be lifting anything greater than 10 pounds..." (Underlining added)

[Appellant's doctor #1] referred the Appellant to [Appellant's physiatrist #2], a physiatrist, for an assessment. [Appellant's physiatrist #2] saw the Appellant on April 21, 1999 and provided a report wherein he noted that the Appellant's neck range of motion is within normal limits in all planes and pain free. He concluded that the Appellant showed signs and symptoms of a right rotator cuff tendinopathy.

On May 19, 1999, [Appellant's physiatrist #2] provided a further report to [Appellant's doctor #1] where he indicated that he saw the Appellant on May 18, 1999 and stated:

> "(The Appellant) reports that after approximately a week after he saw me that he attended [Appellant's physiatrist #1] who treated him with an injection to the anterior shoulder and some tender points in the posterior shoulder Neither of these injections sounded like a subacromial injection. I requested a copy of [Appellant's physiatrist #1's] letter to you in order to confirm this.

> On examination today he still has signs of rotator cuff tendinopathy with weakness of both abductors and the external rotators in the impinged positions. Pain is again reproduced with dislocation/relocation test.
>
> As he is currently seeing two physiatrists, I have asked him to continue with [Appellant's physiatrist #1] so as not to confound his management by two differing approaches to his problem. Once he is finished with [Appellant's physiatrist #1], if he is still symptomatic I would be pleased to see him again in the future."

On June 4, 1999, [Appellant's doctor #1] provided a further report to MPIC wherein he stated:

1. His frustration with a lack of progress in resolving the Appellant's medical problems.
2. The Appellant has seen him regularly since the motor vehicle accident and has complained regularly of ongoing pain and discomfort and although the Appellant had been attending physiotherapy and multiple specialists, his pain was seemingly worse and had a great impact on his life.
3. The Appellant is seeing two physiatrists, [Appellant's physiatrist #1] and [Appellant's physiatrist #2].
4. "...[Appellant's physiatrist #1], a physical medicine rehabilitation specialist, feels that [the Appellant] has "cervical pain syndrome and strain of the interspinous ligaments with active trigger points in the right trapezius and sternocleidomastoid muscles." [Appellant's physiatrist #2], another physical medicine rehabilitation specialist, feels he might have a right rotator cuff tendinopathy. At the end of April and beginning of May 1999 he had a complete occupational therapy and physiotherapy consultation and their findings were of tight cervical muscles compensating for apparent laxity in the acromioclavicular joint of his right shoulder. However, most significantly his financial circumstances are causing ongoing concern and anxiety. It would be fair to call it a crisis and that is his ongoing pain and discomfort has not allowed him to continue working as he was prior to his motor vehicle accident.

   My last examination of [the Appellant] was on June 3, 1999 and at that point he was still having ongoing discomfort and limitation not allowing him to resume his normal work activities. He is working hard by going to physiotherapy regularly, taking prescribed medications and doing his exercises. We are currently trying to elucidate a final diagnosis and a specific therapy plan." (Underlining added)

[Appellant's physiatrist #1] provided a report to [Appellant's doctor #1] on July 9, 1999 indicating that he saw the Appellant on June 28, 1999, physically examined the Appellant and stated:

> "Clinically [the Appellant] has right shoulder impingement syndrome with possibility of acromioclavicular joint arthritis. He has regional myofascial neck pain syndrome. (Underlining added)

[Appellant's physiatrist #1] further stated:

> "...Clinically I am not convinced that he has any rotator cuff or bicipital tendon tear." (Underlining added)

MPIC's case manager referred the file to MPIC's medical consultant, [MPIC's doctor]. [MPIC's doctor] provided an interdepartmental memorandum dated July 21, 1999. He indicated that after reviewing all of the medical evidence on the Appellant's file, he observed that the Appellant had the following conditions:

> "1. Cervical, thoracic and lumbar strain
> 2. Right acromioclavicular joint sprain
> 3. Rotator cuff tendinopathy
> 4. Symptoms of depression" (Underlining added)

[MPIC's doctor] further stated:

> "The first documentation of problems involving the right shoulder was identified in a report provided by [Appellant's physiotherapist #2] dated March 9, 1999. Prior to the date of this report there is no documentation of trauma occurring to [the Appellant's] right shoulder or specific problems involving the glenohumeral or acromioclavicular joints. [Independent physiotherapist] did identify some tightness in the posterior capsule but this was very mild and did not lead [independent physiotherapist] to diagnose a specific problem involving the right shoulder. It is not probable that a shoulder injury would go undetected for approximately six months considering the assessments [the Appellant's] had undergone over that period of time. The diagnosis pertaining to [the Appellant's] right shoulder condition varies from report to report. [Appellant's physiatrist #2's] was of the opinion that [the Appellant] had a rotator cuff tendinopathy and in other reports it is indicated that [the Appellant's] symptoms were as a result of problems involving the acromioclavicular joint...
>
> Based on the information obtained from the documents reviewed, it is my opinion that [the Appellant] developed clinical findings in keeping with a musculotendinous strain and

> involving the cervical, thoracic and lumbar region as a result of the motor vehicle collision he was involved in. There is insufficient medical information to establish a cause/effect relationship between the right shoulder condition he had been identified as having and the motor vehicle collision he was involved in." (Underlining added)

[Appellant's doctor #1] referred the Appellant to [Appellant's orthopaedic surgeon #1], an orthopaedic surgeon at the [hospital #2]. [Appellant's orthopaedic surgeon #1] provided a report to [Appellant's doctor #1] on September 22, 1999 in which [Appellant's orthopaedic surgeon #1] indicated he may send the Appellant for an arthroscopy of the right shoulder. [Appellant's orthopaedic surgeon #1] further noted that the Appellant's neck pain should eventually settle down.

[Appellant's doctor #1]'s chart notes, filed at the appeal proceedings, indicated that he had been seeing the Appellant since September 12, 1997 (approximately 11 months prior to the motor vehicle accident). His chart notes indicated:

Prior to the motor vehicle accident:

a) the Appellant complained of back pain on September 12, 1997. [Appellant's doctor #1] provided the Appellant with some medication.
b) On a return visit on September 19, 1997, the Appellant's condition had much improved.

The balance of the chart notes created after the motor vehicle accident are as follows:

- The next entry is for August 24, 1998 which indicated a diagnosis of whiplash. The Appellant also complained of pain to his lower back and that he had trouble sleeping.
- On September 2, 1998, the chart notes indicated that the Appellant was complaining about a lot of pain and discomfort to his neck.

- On September 10, 1998, [Appellant's doctor #1] diagnosed whiplash and noted that the Appellant was emotionally disturbed, however [Appellant's doctor #1] was unclear how the recent motor vehicle accident related to changes in his emotional state or possibly was related to stress and having too much going at one time.
- On October 15, 1998, the chart notes indicated a diagnosis of whiplash. The Appellant was attending physiotherapy and stated that his pain scale was 4/5.
- On November 2, 1998, the Appellant was complaining about pain to his right shoulder and back area. [Appellant's doctor #1] intended to refer him to [Appellant's physiatrist #1].
- On December 7, 1998, the chart notes indicated ongoing neck discomfort and that the Appellant was struggling sleeping through the night.
- On January 4, 1999, the Appellant indicated that there had been no change in his level of pain and that he was stopping physiotherapy.
- On February 1, 1999, the chart notes indicated ongoing neck pain.
- On March 1, 1999 the chart notes indicated neck pain and stated that the patient had been involved in a motor vehicle accident in August 1998 and since then has been experiencing whiplash injury type neck pain.
- On April 8, 1999, the Appellant complained of right shoulder pain.
- On May 6, 1999, [Appellant's doctor #1] noted that the Appellant has seen [Appellant's physiatrist #2] who believed the Appellant had signs and symptoms of a right rotator cuff tendinopathy. He was also seeing [Appellant's physiatrist #1] who provided an injection which did not appear to be relieving the shoulder pain. [Appellant's doctor #1] further stated that the right shoulder pain appeared to be turning into chronic pain.
- On June 3, 1999, the chart notes indicated ongoing right shoulder discomfort.

– On July 6, 1999 the chart notes indicated neck pain. [Appellant's doctor #1] stated:

> "He stopped physio b/c it just doesn't seem to be helping anymore. He also feels that there is something going on with AC joint, but he would like to get an MRI before he gets it injected. I explained that sometimes all imaging studies are normal and we don't have a good explanation of why somebody has pain. Pt is continuing to take his antidepressants, but not the anti inflammatories any more. He is not sleeping. He feels just a wreck, a zombie. Financially, he is really feeling under the gun. He has quite a bit of debt, he's trying to negotiate with Autopac to help settle his finances so that he could start to feel healthier. Overall he is fatigued and miserable." (Underlining added)

– On August 26, 1999, the chart notes indicated shoulder pain/syncope. [Appellant's doctor #1] indicated that the Appellant reported attending the Emergency Department at [hospital #1] with an episode of syncope. [Appellant's doctor #1] noted the Appellant's complaints about his condition and reported:

> "...Sleep quality is extremely poor. He copes by forcing himself not to think about the discomfort. He stretches, he is walking, he's trying everything. The only thing that helps is going to a chiropractor from time to time. He claims that he has done everything that people have suggested and he is just not getting anywhere. He is frustrated at the lack of a medical diagnosis and he is angry that doctors haven't been able to tell him what's going on. Financially things are difficult, he is unable to pay his income tax... He has heard nothing from Autopac but he is trying to be positive for his kids who are age [text deleted] years old however he admits that he is not feeling as active or as happy. He is feeling like he is always complaining and he hates that about himself." (Underlining added)

– On September 29, 1999 [Appellant's doctor #1] noted that the Appellant advised him that Autopac is being cut off. On the whole he is feeling very angry about not being able to work at the job and has been told that he may be cut off from Autopac support and this made him even more frustrated and scared. [Appellant's doctor #1] advised the Appellant to go through the appeal process and that would he would support the Appellant by reporting that the Appellant was having ongoing discomfort and seemed to be unable to do his regular job at that time.

Case Manager's Decision – Termination of IRI benefits:

On September 29, 1999 the case manager wrote to the Appellant indicating that MPIC's medical team advised that there was no objective medical evidence to preclude the Appellant from holding his employment. The case manager further indicated that the medical opinion was based on the following:

- "The absence of any information identifying a traumatic event occurring to the joint.
- Information indicating that shoulder symptoms did not develop until six months following the motor vehicle collision..." (Underlining added)

The Appellant was further advised that IRI benefits would continue until October 8, 1999.

On October 4, 1999 [Appellant's doctor #1] wrote to the case manager and expressed his concern over the termination of benefits. [Appellant's doctor #1] indicated that:

> "As you know his first visit to me was on August 24, 1998 and he had an accident on August 21, 1998. His main concern at that time was neck pain and thoracolumbar spine discomfort. Repeated visits concentrated on his neck pain, but it seem to spread to his shoulders and I have a note to that effect on September 10, 1998." (Underlining added)

On November 15, 1999 [Appellant's doctor #1] wrote to the case manager and indicated he had received a copy of [Appellant's orthopaedic surgeon #1]'s report of September 29, 1999 and provided a copy to the case manager for his records. In this letter [Appellant's doctor #1] further indicated that the Appellant had been scheduled for an MRI and that physiotherapy had been recommended by [Appellant's orthopaedic surgeon #1].

> "I've had a chance to review [the Appellant] file containing letters with respect (to) correspondence and consultations notes about his discomforts. He never had neck and shoulder pain prior to his accident and not(e) it is going on in a difficult and fairly disabling fashion. He tells me he is unable to work and I believe him. He tells me that he is having financial difficulty because of this pain and I believe him.
>
> The medical consultant that you have employed says that there doesn't seem to be a pathological condition in his shoulder arising from the automobile accident. How then do we explain the fact that there was no pain prior to the accident and developed afterwards?

> [The Appellant] is very frustrated and has been suffering quite a bit form this discomfort. I have been unable to provide a specific pathological diagnosis, and have employed numerous specialists. Hopefully [Appellant's orthopaedic surgeon #1] would be able to shed some light on what exactly is happening, but there is no doubt in my mind that his pain is related to his car accident because it was not present prior to the accident and is certainly ongoing and difficult for him to cope with after the accident." (Underlining added)

Case Manager's Decision, November 29, 1999 – Physiotherapy Treatment

On November 29, 1999 the case manager provided the Appellant with a decision rejecting the Appellant's request to provide coverage for physiotherapy treatments as requested by [Appellant's orthopaedic surgeon #1]. The case manager stated that [Appellant's orthopaedic surgeon #1] had not stated that physiotherapy was required as a precursor to an MRI scan. MPIC's Medical Services team had reviewed the matter and concurred with the decision that physiotherapy was not a medical necessity prior to an MRI scan. The case manager further stated that a review of the medical evidence did not establish that there was a causal relationship between the Appellant`s shoulder symptoms and his motor vehicle accident. Therefore, pursuant to Section 131 of the MPIC Act and Section 5 of Manitoba Regulation 40/94, the request to cover the physiotherapy expenses was rejected. (Underlining added)

The Internal Review Officer wrote to [Appellant's orthopaedic surgeon #1] and requested his comments on the issue of causation. In his response on April 4, 2000, [Appellant's orthopaedic surgeon #1] noted there was no objective information to indicate that a rotator cuff injury occurred at the time of the motor vehicle accident. He noted there were no immediate complaints of shoulder joint symptoms which ought to have been reported by the Appellant had it been injured in the course of the collision. [Appellant's orthopaedic surgeon #1] further noted that it was acknowledged that the Appellant never had similar problems prior to the collision. As

well, he pointed out that there were no other incidents that he was aware of in the form of an injury to the shoulder which could have led to the development of a rotator tendinopathy since the collision. [Appellant's orthopaedic surgeon #1] stated:

> "This then obviously leaves us with the dilemma of what causes his "severe rotator cuff tendinitis on the MRI". Spontaneous rotator cuff tears especially with aging, do occur, but this gentleman has more of a very active tendinitis. It is hard to believe, at the age of [text deleted], that he would develop a spontaneously (sic) tendinitis of this sort without any traumatic event.
>
> This then leaves us with the objective findings of no clinical evidence of a tendinitis acutely although there is a remote chance that it may have been missed versus the argument that this did occur given the patient history and the fact of the severe tendinitis he has on the MRI with no other inciting or traumatic event. Both arguments most definitely have their merits.
>
> I suspect what most probably happened was that he may have had an injury that was mild to his shoulder at the time of the motor vehicle accident and his main complaint was to his neck, but, as his neck improved, I suspect that his shoulder continued to deteriorate over the time and became more prominent of a symptom..." (Underlining added)

[MPIC's doctor] provided an interdepartmental memorandum to the case manager on April 27, 2000 and commented on [Appellant's orthopaedic surgeon #1's] opinion as follows:

> "[Appellant's orthopaedic surgeon #1] provided a possible explanation as to how [the Appellant's] right shoulder condition might have been missed and in turn progressed to the condition identified on the MRI. The explanation appears to be based on the information that [the Appellant's] right shoulder pain became more apparent over the two to three week period following the motor vehicle collision. The clinical notes do not identify a prominent right shoulder pain during this period of time. There is documentation of neck pain in association with a burning sensation in the right shoulder as well as stiffness in both shoulders. Cervical pain can often produce referred symptoms to the shoulder regions. The first documentation of shoulder pain in the absence of neck pain is noted on November 2, 1998. Subsequent to this, there is no documentation of ongoing right shoulder pain that would be in keeping with a shoulder joint abnormality such as a rotator cuff tendinopathy or acromioclavicular joint abnormality." (Underlining added)

[MPIC's doctor] further indicated that:

1. Overuse is the most common cause of rotator cuff tendinitis and repetitive activities over shoulder height could develop irritation and inflammation around the rotator cuff tendon which in turn can lead to subacromial bursitis.

2. "After reviewing the new documents submitted to [the Appellant's] file, it is my opinion that based on a reasonable degree of medical probability, the premise that the motor vehicle collision and the right shoulder condition are causally related, cannot be established." (Underlining added)

On May 8, 2000 MPIC's Internal Review Officer wrote to [Appellant's orthopaedic surgeon #2], who had performed surgery on the Appellant's right shoulder and requested a narrative report advising whether in his opinion the Appellant's ongoing symptoms and problems were causally connected to the motor vehicle accident of August 21, 1998 and whether the Appellant was unable or substantially unable to carry out his employment duties as a result or the injuries arising from the motor vehicle accident and whether physiotherapy treatments were medically required as a result. In his reply dated June 15, 2000 [Appellant's orthopaedic surgeon #2] indicated he was uncertain whether the patient's shoulder condition was related to the motor vehicle accident and he felt that as a result of the rotator cuff tendinopathy, the Appellant was unable to carry out all aspects of his employment. [Appellant's orthopaedic surgeon #2] concluded that based only on the patient's history that "the symptoms he experiences are causally related to the motor vehicle accident of August 21, 1998". He concluded that "this is not uncommon for shoulder pain relating to rotator cuff strain which does occur at the time of a motor vehicle accident to develop days to a couple of weeks following the accident". (Underlining added)

[Appellant's physiatrist #2] provided a report to the Internal Review Officer on September 8, 2000. [Appellant's physiatrist #2] extensively reviewed all the medical reports in respect of the Appellant. [Appellant's physiatrist #2] concluded:

1. "Right rotator cuff tendinopathy
2. Whiplash-Associated Disorder Type II (resolved)
3. Possible depression
4. Possible chronic pain disorder with delayed recovery" (Underlining added)

In respect of his diagnosis [Appellant's physiatrist #2] indicated:

> "In this patient's case, he has shown signs of pain in impinged positions, with weakness of the rotator cuff muscles. He also has signal changes in the rotator cuff tendon on MRI supportive of the diagnosis of tendinopathy.
>
> There are several notes on file, in particular in the records of [Appellant's doctor #1], that speculate on whether this patient has a depressed mood. While he has not shown vegetative signs or expressed suicidal ideation, it appears that intermittently his mood had been sufficiently depressed to warrant treatment with anti-depressant medications. It is probable that in the setting of depression, chronic pain symptoms would be less well tolerated. This may have resulted in the emergence of a chronic pain disorder, where symptoms have persisted beyond the expected duration of the condition and to a greater degree then (sic) would have otherwise been expected as a natural history". (Underlining added)

[Appellant's physiatrist #2] disagreed with [Appellant's orthopaedic surgeon #2's] opinion that the rotator cuff pathology followed the motor vehicle accident. [Appellant's physiatrist #2] stated that there are no literature citations which document rotator cuff pathology following motor vehicle collisions.

[Appellant's physiatrist #2] opined that the motor vehicle in this appeal was rear-ended and that such a rear-end collision could not cause a rotator cuff pathology.

> "In a rear-end collision, such contact is not possible. In a driver restrained by a lap and shoulder belt, the shoulder is unlikely to contact the interior of the vehicle. It is improbable that such a mechanism would result in rotator cuff impingement. Therefore, the mechanism of injury as proposed is an improbable cause of rotator cuff tendinopathy." (Underlining added)

[Appellant's physiatrist #2] further stated:

> "As has been stated previously, at 6 months post-collision, the patient's clinical signs and symptoms were medically probably related to a cervical origin with secondary referral to the shoulder girdle. Up until that time, all documentation acknowledged his condition as

> neck-related. This is consistent with [Appellant's doctor #1's] letter of referral to me of February 3, 1999, which described predominantly neck-associated symptoms." (Underlining added)

Under the heading of "Causation" [Appellant's physiatrist #2] stated:

> "...with a reasonable degree of medical certainty, there is an improbable causal relationship between the patient's rotator cuff tendinopathy and the motor vehicle accident on August 20, 1998." (Underlining added)

At page 23 of his report [Appellant's physiatrist #2] further stated:

> "...A referral to a clinical psychologist may be useful diagnostically to identify psychosomatic barriers to rehabilitation and to provide an opinion on the degree of depression that may be contributing to his presentation." (Underlining added)

Internal Review Officer's Decision – October 24, 2000; Termination of IRI:

The Internal Review Officer reviewed the case manager's decision of September 29, 1999 in which the Appellant's entitlement to IRI was rejected on the grounds that the Appellant's right shoulder symptoms were not related to the motor vehicle accident.

In arriving at his decision, the Internal Review Officer relied on [Appellant's physiatrist #2's] report of September 8, 2000, wherein he stated:

> "He appears to base his opinion on:
> 1. There is no medical literature suggestive of a cause/effect relationship between rear-end collisions and rotator cuff pathology
> 2. That the clinical presentation following the accident was not consistent with rotator cuff tendinopathy
> 3. That the symptoms up to 6 months post-collision appear to be of a cervical nature
> 4. The temporal relationship of events documented is not supportive of the existence of cause-effect relationship"

The Internal Review Officer further noted:

> "Therefore, largely based upon the opinions of [Appellant's physiatrist #2] and [MPIC's doctor], I am upholding the termination of your income replacement indemnity benefits for the reason that your right rotator cuff pathology is not directly related to the collision.

> As to the therapeutic issue, [Appellant's physiatrist #2] has indicated that regardless of the causation issue he recommends that you receive the course of treatment as set out on page 23 of his report. As I can concur with the appropriateness of those therapeutic recommendations set out therein, I am directing that you be provided with that treatment in the event that you elect to pursue same.
>
> I also note that [Appellant's physiatrist #2] has suggested that a referral to a clinical psychologist to identify psychosomatic barriers to rehabilitation and to discuss the degree of depression which may be contributing to your presentation would be in order. It would be my view that this enquiry (sic) should also include a determination as to what extent, if any, your possible depression and/or chronic pain syndrome is causally related to the motor vehicle accident. This could result in your entitlement to Income Replacement Indemnity Benefits." (Underlining added)

As a result of [Appellant's physiatrist #2's] comments MPIC referred the Appellant to [independent psychologist #1] for an assessment. [Independent psychologist #1] reported to MPIC on January 22, 2001 and stated that he had assessed the Appellant on January 8 and 11, 2001. [Independent psychologist #1] stated that the Appellant was referred for a psychological assessment in order to determine his current mental status and the possible need for psychological intervention at this time and reported:

> "Based on [the Appellant's] history and current presentation, the following diagnosis is suggested:
>
> Axis I Pain Disorder Associated With Both Psychological Factors and a General Medical condition, Chronic
> Axis II Nil
> Axis III Chronic Shoulder and Neck Pain
> Axis IV Occupational and Economic Problems
> Axis V Current GAF = 65
>
> It would appear that this pain disorder developed as a result of the MVA of August 21, 1998. Given this diagnosis, it is likely that [the Appellant] would benefit from some psychological intervention. This treatment would focus on improving his pain management skills. I would be prepared to see [the Appellant] for some Cognitive-Behavioral psychotherapy of one hour duration on a once weekly basis, charged at a billable rate of $125.00 per hour. This type of psychotherapy is often used for developing effective pain management strategies. I would like to contract for 6 sessions to begin with, and then reevaluate the need for further treatment after this." (Underlining added)

Commission Hearing – April 26, 2001:

The Appellant appealed the Internal Review Officer's decision of October 24, 2000 to the Automobile Injury Compensation Appeal Commission (hereinafter referred to as the Appeal Commission). The Commission held a hearing on April 26, 2001 and after discussions with both parties the proceedings were adjourned.

MPIC's Senior Solicitor attended the hearing and on the same date wrote to MPIC's case manager and stated:

> "The Commission immediately focused upon the psychological aspects of this claim and the lack of documentation from [independent psychologist #1] as to whether the psychological condition/pain disorder was sufficient to cause [the Appellant] to be absent from the workplace. It is acknowledged that [the Appellant] has continued to work albeit he indicates he is able to do approximately fifty (50%) percent of what he was capable of prior to the accident. Chief Commissioner [text deleted] directed that I seek a report from [independent psychologist #1] on the issue. As well, he indicated that there were two orthopaedic opinions on file which have found a connection between the motor vehicle accident and rotator cuff pathology... (Underlining added)
>
> As soon as I am in receipt of [independent psychologist #1's] report, I will forward a copy and perhaps we should meet in order to determine how to proceed on this matter. If you have any questions please contact me. Thank you."

On the same date, April 26, 2001, MPIC's senior solicitor wrote to [independent psychologist #1] directly and indicated:

> "I have had an opportunity of reviewing your report dated January 22, 2001 with respect to your involvement with [the Appellant]. The diagnosis evident is that [the Appellant] suffers from a pain disorder which developed as a consequence of a motor vehicle accident occurring August 21st, 1998. At present, The Manitoba Public Insurance Corporation is considering his claim for income replacement indemnity benefits subsequent to October 8th, 1999.
>
> [The Appellant] has advised us that he has continued with employment as the owner and operator of a [text deleted]. [The Appellant] has indicated that he is able to do that employment daily, albeit, at a rate of fifty (50%) percent of what he was capable of handling prior to the accident.
>
> There are two aspects of [the Appellant's] health which may have been impacted as a result of the accident – one physical while the other may be psychological. I would

> appreciate your co-operation in advising as to whether the pain disorder/psychological consequences you have diagnosed would in any way have impaired [the Appellant's] activity in the workplace subsequent to October 8th, 1999. I appreciate that you did not have the opportunity of seeing him until January, 2001, however, any comments you might be prepared to make particularly after an analysis of the medical package, which I assume you have received on this file, would be appreciated. Of course, we will be pleased to cover your account. (Underlining added)
>
> There is some urgency with respect to this request as we hope to either resolve this matter on an expeditious basis directly with [the Appellant] or engage in a hearing before the Automobile Injury Compensation Appeal Commission within the next two weeks. Consequently, I would appreciate any effort that you might be prepared to make in accommodating those time lines."

[Independent psychologist #1] replied on April 30, 2001:

> "I am writing in response to your letter of April 26, 2001. I should first indicate that I have not reviewed all the medical reports in this file as I was not sent them. The only extensive report I have was written by [MPIC's Internal Review Officer] dated October 24, 2000. This report, as well as some letters written by [the Appellant]), were provided to me by [the Appellant]. As such, my response to your letter is based on my assessment and a review of [MPIC's Internal Review Officer's] report in order to accommodate your urgent time lines.
>
> Specifically, your question to me is whether [the Appellant's] chronic pain disorder and partially remitted depression would have impaired his activity in the workplace subsequent to October 8th, 1999. My simple answer to your question is yes, I believe his chronic pain does impair his work activity. Other doctors who have seen [the Appellant] have also alluded to his psychological difficulties resulting from the MVA and the effect it has had on his life. In [MPIC's Internal Review Officer's] report, he highlights [Appellant's physiatrist #2's]report of September 8, 2000 that suggests the presence of a possible chronic pain disorder as well as partially remitted depression. [MPIC's doctor] also apparently identified symptoms of depression. Furthermore, [Appellant's doctor #1] (from a report of June 4, 1999) has indicated that [the Appellant's] condition has had a significantly negative impact on his ability to work as well as other aspects of his life.
>
> From [the Appellant's] perspective, his pain disorder has resulted in obvious limits in his ability to do his current job. As you noted, he is going to work daily, but is only working at about 50% of what his pre-accident activity level was. He has constant pain and must pace himself in his daily activities. If he does excessive lifting or repair work one day he generally "pays" for it the next with increased pain. He tries to limit the amount of pain medication he takes due to the side effects that it causes, but he still must take it in order to function at work. His depression for the most part, seems well controlled by the antidepressant he is currently taking." (Underlining added)

Consent Order – May 28, 2001:

As a result of [independent psychologist #1's] April 30, 2001 report, the parties reached an agreement to rescind the Internal Review Officer's decision of October 24, 2000 terminating the Appellant's IRI benefits. The Commission issued a Consent Order which stated:

> "The Automobile Injury Compensation Appeal Commission held a hearing on: April 26th, 2001.
>
> Counsel for Manitoba Public Insurance Corporation ('MPIC') having advised the Commission that MPIC was withdrawing its termination of benefits, and [the Appellant] having indicated his acceptance of that offer, by authority of Section 184 (1) of the Manitoba Public Insurance Corporation Act, the Commission orders that
>
> 1. the Appellant's benefits be reinstated;
>
> 2. MPIC pay to the Appellant income replacement indemnity from the date of termination to the date of actual payment together with interest thereon at the prescribed rate from the date when each instalment respectively fell due until the date of actual payment;
>
> 3. MPIC reimburse the Appellant for physiotherapy expenses (if any) that he may have incurred following termination of those benefits by MPIC; and
>
> 4. The decision of MPIC's Internal Review Officer dated October 24th, 2000, be therefore rescinded."

On July 15, 2001, [independent psychologist #1] wrote to the case manager and provided a summary of his last eight treatment sessions with the Appellant. He stated that in his initial assessment of the Appellant in January 2001 he indicated that he had chronic pain disorder related to his shoulder and neck injury. He further stated that his primary focus in therapy had been to work on his pain management skills utilizing a cognitive-behavioural therapeutic approach. He further indicated that as a result of these treatments he was making progress since the initial meeting with the Appellant in January 2001.

On June 19, 2002 [Appellant's doctor #2] wrote to the senior case manager indicating that he had seen the Appellant on June 18, 2002 and stated:

> "His objective findings include a mildly positive impingement sign and painful arc on the right, as well as some tenderness of the shoulder girdle and myofascial trigger points in the infraspinatus, sub-scapularis and pectoralis major...
>
> As to other pertinent information, my feeling is that [the Appellant] has not yet reached his maximum medical improvement. He may experience some improvement in his pain level and perhaps his functioning with a higher dose of gabapentin."

On August 30, 2002 [Appellant's athletic therapist #1], athletic therapist at [text deleted], wrote to [Appellant's doctor #1] and stated that he had assessed the Appellant on August 15, 2002 and he reported significant right shoulder pain which involved his neck and right arm and radiating in his hand. [Appellant's athletic therapist #1] stated:

> "<u>This patient was very difficult to assess due to the generalization of the painful sites and symptoms which are exacerbated with almost every motion. He is very consumed with his pain and appears very reactive to any motion. This makes it very difficult to affect any kind of meaningful treatment program</u>.
>
> I suggested to him that he needs to get some control over the pain and his reaction to that pain before he could begin any aggressive therapy. He did mention that the only relief he experienced was with periodic massage treatment. This treatment however, was short lived and was provided only once a week." (Underlining added)

The case manager wrote to [Appellant's doctor #3] on September 17, 2002 and stated:

> "[The Appellant] has advised that he continues to own/operate his [tet deleted] business. As this was not the occupation that he held at the time of the MVA MPI is required to complete a 2 year determination to determine suitable employments.
>
> Employment is determined with the assistance of a Transferable Skills Analysis (TSA) which identifies suitable employments based on education, experience, skills and physical limitations.
>
> A TSA has been completed and has identified suitable employment as a Technical Sales Representative. I have attached an outline of duties for this position from the National Occupational Classification. Please confirm that [the Appellant] has the functional capabilities to perform these employments as outlined.
>
> <u>√</u> Yes, [the Appellant] is physically capable of performing this occupation.*...
>
> * A trial of duties would be advised to see if there is any exacerbation of his chronic pain syndrome.

[Independent psychologist #1] provided a further report to the case manager on April 1, 2002 wherein he indicated that the Appellant was back at work full time but continued to be limited in terms of his work tasks due to his chronic pain. [Independent psychologist #1] stated:

> "As far as my work with [the Appellant] is concerned, we have been working on pacing and relaxation strategies to help him manage his pain more effectively. He is back at work now full time, but continues to be limited in terms of his work tasks due to his chronic pain. He is to see [Appellant's orthopaedic surgeon #2] (his surgeon) in early May and perhaps he may have some ideas about the ongoing problems that [the Appellant] is experiencing with his shoulder and neck.
>
> From my perspective, I feel that I am nearing the end of what I can do to help [the Appellant]. As such, I would like to contract for 4 more sessions to reinforce the pain management skills we have been working on and then terminate our sessions at that time." (Underlining added)

In his report to the case manager on August 17, 2002 [independent psychologist #1] stated:

> "In my last report to [text deleted], I noted that [the Appellant] has been receiving treatment from [Appellant's doctor #2] and that I was working with him to reinforce his use of relaxation and pacing to manage his chronic pain. [The Appellant] has continued treatment with [Appellant's doctor #2] and has also seen a psychiatrist at [text deleted] who increased his use of gabapentin (an anticonvulsant often used for pain) and discontinued his antidepressant. Neither the treatment with [Appellant's doctor #2] or the increase in medication has altered [the Appellant's] pain in any appreciable manner. [The Appellant] appears to be doing better, however, in terms of his pacing and acceptance of his limitations. A recent letter given to me by [the Appellant] addressed to you from [Appellant's orthopaedic surgeon #2] (June 20, 2002) indicates that [Appellant's orthopaedic surgeon #2] has nothing more to offer him in terms of treatment." (Underlining added)

[Independent psychologist #1] further indicated that it was his intention to terminate treatment with the Appellant as there was little else he had to offer him. [independent psychologist #1] further stated that just prior to his last session with the Appellant on August 8, 2002, he had a fall at his workplace which increased his pain and decreased his mood. As a result, [independent psychologist #1] felt it was not a good time to quit treating him.

On October 21, 2002 [independent psychologist #1] wrote to the senior case manager indicating that he was terminating his therapy with the Appellant and stated:

> "As indicated in my last letter, [the Appellant] continues to experience chronic pain and there is a subjective increase in his pain since a fall at work in August. From my perspective, he has all the psychological tools I can give him to deal with the pain at this point. He has been referred to the [text deleted] and has also been referred back to the surgeon ([Appellant's orthopaedic surgeon #2]) who operated on him. He is currently taking two medications for pain which help somewhat, but hopefully the [text deleted] will be able to offer him more in terms of pain relief." (Underlining added)

MPIC determined that since the Appellant was operating his own [text deleted] business and was not performing the occupation he had held at the time of the motor vehicle accident, MPIC was required to complete a Two-Year Determination to determine suitable employment for the Appellant. MPIC`s case manager wrote to [Appellant's doctor #1] on October 18, 2002 and asked whether, in his opinion, the Appellant had the functional capabilities to perform the employment of a Technical Sales Representative. [Appellant's doctor #1] replied that the Appellant was physically capable of performing this occupation.

Two Year Determination – November 8, 2002:

MPIC is required to make a determination of the Appellant's employment in the second anniversary after an accident pursuant to Section 107 of the MPIC Act.

In her Two-Year Determination Decision of November 8, 2002, the case manager quoted Section 107 of the MPIC Act which states:

> **New determination after second anniversary of accident**
>
> 107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The case manager further stated that the determined employment in the enclosed Transferable Skills Analysis was completed by [occupational rehab consulting company] on July 8, 2002. When completing the analysis the Appellant's work history, education and transferable skills were identified to determine suitable alternate employment.

> "Based upon the Transferable Skills Analysis and given your level of function, skills and abilities your (sic) have been determined as a "Technical Sales Specialist" Level 3. In accordance with Schedule C of the Manitoba Public Insurance Regulations 39/94, the determined employment is classified in the category of "Technical Sales Occupations and related Advisers". Schedule C is a table of classes of employment wherein gross employment income by occupation is listed based on average earning levels supplied by Human Resources Development Canada. The category of employment stated has the potential annual income of $59,545.00 (2002 Schedule C).
>
> The physical demands of the determined occupation have been reviewed by [Appellant's doctor #1], and he has confirmed that you have the physical capacity to perform the duties given your present physical restrictions.
>
> As of the date of the two-year determination, November 8, 2002, (date of this correspondence), you have one year to secure the employment, in accordance with Section 110(1)(d) of the Manitoba Public Insurance Corporation Act (attached).
>
> During the one-year period job search assistance will be provided to assist you in locating employment in the determined field.
>
> Should you secure employment, during the one year, your Income Replacement Indemnity benefits will be reduced by 75% of the net income earned, in accordance with Section 116 of the Manitoba Public Insurance Corporation Act (attached).
>
> On November 8, 2003, your Income Replacement Indemnity (IRI) benefit will be reduced by either your actual net earnings or the net earnings from the Schedule C income level, biweekly amount $1,652.65, whichever is greater, in accordance with Section 115 of the Manitoba Public Insurance Corporation Act (attached)."

On November 21, 2003 MPIC's case manager wrote to the Appellant indicating that the 2 year determination was completed on November 8, 2002 and the 1 year job search ended on November 8, 2003. As a result, the Appellant's IRI benefits ended on November 8, 2003 in accordance with Section 115 of the MPIC Act.

On November 8, 2002 MPIC issued a Two-Year Determination in respect of the Appellant and determined his employment as a "Technical Sales Specialist Level 3". The Appellant was advised that his IRI benefits would be reduced as of November 8, 2002 based on the determined employment classification. The Appellant was also advised that the physical demands of the determined employment had been reviewed by [Appellant's doctor #1], his personal physician, who confirmed that the Appellant had the physical capacity to perform the duties given his present physical restrictions.

IRI Benefits Terminated November 8, 2003:

On November 21, 2003 MPIC's case manager wrote to the Appellant indicating that the Appellant's one-year job search had ended as of November 8, 2003 and as a result the Appellant`s IRI benefits would be terminated as at that date pursuant to Section 115 of the MPIC Act.

On November 14, 2003 [Appellant's doctor #1] wrote to MPIC and stated:

> "I've been asked by [the Appellant] to write a letter on his behalf supporting his appeal for income replacement regarding his ongoing disability related to pain in his neck and right shoulder.
>
> As you know, he has chronic pain and we've never been able to find a specific abnormality despite multiple surgeries and diagnostic images. He's seen numerous physicians for opinions, again with no specific diagnostic abnormality.
>
> However, I was this patient's family doctor prior to the accident and he was functioning at a very high level. After the accident he developed pain and limitation and he has ongoing discomfort on a daily basis. He reports that he is able to work flexible hours at his own business and he is afraid that by finding another job he won't be able to maintain this flexibility. Examples of flexibility include bringing in part-time help to do heavy chores that he is unable to do. He notes that his business is not earning enough at this point to support him completely and he is quite afraid of going bankrupt without ongoing income support.
>
> It is indeed unfortunate that we don't have a specific organic cause or a definitive diagnosis, however, there is no doubt that his pain and limitations are real and have been

> outlined in numerous letters in the past to MPI. Today for example, [the Appellant] rates his pain as a 7 to 9/10. His family life is suffering and he has found meeting with a psychologist to actually be helpful. This is something that he would not be able to afford on his own without the resources of MPI.
>
> There are numerous opinions available from the multiple doctors, however, as person who has been seeing him through this for the past five years I can only offer my point of view that he had been coping up until a certain point. Medications never make a difference, and in fact give him severe side effects.
>
> There is obviously no easy cure or fix that we can help this gentleman, and again I can only report that prior to the accident he was fine and after the accident he developed pain that has obviously gone into a chronic pain syndrome with a complex manifestation. The fear of losing the stability of his work is exacerbating his pain today, I believe." (Underlining added)

In a letter dated August 26, 2004 to MPIC), [Appellant's doctor #1] stated:

> "I understand that [the Appellant] is going through an appeal of his loss of income replacement from MPIC.
>
> After discussion in the clinic with [the Appellant] today, he has asked me to write supporting his statement that he can only work to about 10% of his pre-accident level. Certainly his ability to stand, lift, bend or be physically active for any length of time is severely compromised given his injury.
>
> Although his injury has been difficult to diagnose he has developed an ongoing Chronic Pain Syndrome and, as I am sure you are aware, is being assessed for appropriateness of a neurotomy at the [text deleted].
>
> I believe we have essentially exhausted the medical options within Manitoba. We do not have such a multidisciplinary or coordinated approach to Chronic Pain Syndrome. It might be worthwhile for an assessment at a centre, perhaps the Mayo Clinic. On top of his Chronic Pain Syndrome he is also at very high risk for depression, however, he's never been able to respond to medical management having severe side effects to any kind of medications." (Underlining added)

On November 7, 2004, [independent psychologist #1] wrote to the senior case manager and indicated that he had been requested by MPIC to reassess the Appellant, which he did on November 5, 2004. In this letter [independent psychologist #1] stated:

> "As you are aware [the Appellant] MVA history and subsequent course of treatment, I will not review this information here. In terms of his psychological treatment, [the Appellant] has not seen me since October 21, 2002. I wrote to [text deleted] of MPI after

> our last session and indicated that [the Appellant] continued to experience chronic neck and shoulder pain and that there was little I could do for him treatment wise. He had been referred to the [text deleted] at that time.
>
> Since that last report, little has changed for [the Appellant], he continues to experience chronic pain and his Income Replacement ended about a year ago. He continues to work in his [text deleted] but strictly in a sales and marketing role as he does not feel he can do the physical aspects of the job. He is currently appealing the IRI decision and is actually set to see the [text deleted] on November 19th. [The Appellant] is hopeful this will help him in addressing his pain concerns. He presented with some depressive symptoms (e.g., sleep disturbance, irritability, tearfulness, passive suicidal ideation) today too, these would be characteristic of a chronic Adjustment Disorder related to his pain.
>
> I am hopeful as well, that the [text deleted] can offer him some relief perhaps in the form of some injections although he has been on several medications and has had acupuncture in the past with little success.
>
> At this point I do not have a lot to offer [the Appellant], but perhaps I could review pain management strategies with him as he becomes actively involved in the [text deleted]. I would therefore propose a brief course of treatment in this regard – four biweekly sessions at a cost of $130.00 per session. I could then write to you once these are completed with any further recommendations at that time." (Underlining added)

In a treatment plan report to MPIC dated November 23, 2004, [Appellant's chiropractor] stated that the Appellant`s chronic pain was present.

Commission's Decision – Determined Employment – November 17, 2004 and January 31, 2005:

The Appellant appealed the determined employment of a technical sales specialist level 3 to the Commission. The hearing was held on November 17, 2004 and January 31, 2005 and it was determined by the Commission that the employment should be that of a "Sales Clerk and Sales Persons Level 3" in Schedule C of Manitoba Regulation 39/94 and that the Appellant was capable of holding employment as at November 8, 2002.

Subsequent to the Commission's decision [MPIC's doctor] provided an interdepartmental memorandum dated March 10, 2005 to the case manager in response to a request to review documents submitted subsequent to [MPIC's doctor's] April 27, 2000 review. [MPIC's doctor]

indicated that the documents reviewed identified that the Appellant had shoulder symptoms in keeping with rotator cuff tendinopathy/impingement syndrome and a MRI revealed findings that supported the diagnosis. He further indicated that the reports contained information making reference to pain emanating from the acromioclavicular joint as well as pain arising from the cervical spine.

[MPIC's doctor] noted that on a previous review of the Appellant's file it was determined that the medical evidence did not establish a cause/effect relationship between the incident in question and the right shoulder symptoms which appeared to be a by-product of a rotator cuff tendinopathy. This opinion is consistent with [Appellant's physiatrist #2]'s comments provided to him. [MPIC's doctor] further stated that [Appellant's physiatrist #2] provided his comments with regard to the mechanism by which the rotator cuff could be injured, the absence of medical literature documenting rotator cuff pathology following a motor vehicle incident and the incident in question being an improbable cause of rotator cuff tendinopathy. [MPIC's doctor] further indicated:

> "The file does not contain documentation detailing [the Appellant's] arthroscopic findings. It is assumed that in the absence of such documentation; [Appellant's orthopaedic surgeon #2] did not identify findings that could be causally related to the rear end collision that occurred many years previously and did not expose the shoulder to a degree of trauma." (Underlining added)

[MPIC's doctor] further stated:

> "It is my opinion the medical evidence on file does not indicate [the Appellant] developed a condition as a result of the incident in question that in turn would result in impairment of function and thereby entitle him to permanent impairment benefits."

[Appellant's athletic therapist #2], athletic therapist, wrote to MPIC's case manager on March 20, 2005 and provided an assessment and treatment recommendations. [Appellant's athletic therapist #2] stated:

"The claimant reports poor sleep hygiene. He reports he attempts 7 hours of sleep per night waking up 3-4 times during this period due to pain. He does not feel restored upon waking.

MAIN COMPLAINTS

1. Right shoulder pain.
The claimant reports he has a toochache (sic) type pain in right side of his neck, upper trapezius, right deltoid and along the medial border of the right scapula. He reports at times it will feel like a "solid" pain in the shoulder. He reports the pain in his neck and down the scapula will be a throbbing and burning type sensation. He reports he feels as if he is not very flexible. The claimant reports using his mouse at work, his workplace activities, and general movement of the shoulder will increase his pain. He reports laying in his bed with his arms up and hand behind his head will make his pain better, but with this his hands will go numb. The claimant also reports driving his motor home will ease his pain due to the height of the arm rest. (Underlining added)

IMPRESSION

1. Sleep Disturbance
2. Impingement findings of the right GH joint.
3. Dysfunction of the scapular stabilizers and cervical stabilizers. The findings of the scapular dysfunction are consistent with narrowing of the subacromial space.
4. Decreased flexibility of the cervical spine and right GH joint."

[Appellant's athletic therapist #2] recommended 15 sessions of athletic therapy in order to increase the functional status of the Appellant.

[MPIC's chiropractor], chiropractic consultant with MPIC's Health Care Services, provided a report to the case manager dated June 8, 2005. [MPIC's chiropractor] was requested to provide an opinion regarding the medical necessity of proposed chiropractic treatments for the Appellant in respect of his motor vehicle accident injuries. [MPIC's chiropractor] noted that [Appellant's athletic therapist #2]'s report of February 15, 2005 diagnosed the Appellant with a chronic pain syndrome. [MPIC's chiropractor] was of the view that there is little evidence that chiropractic adjustments would be an appropriate treatment for the condition of chronic pain syndrome. (Underlining added)

Case Manager's Decision – June 20, 2005:

On June 20, 2005 the case manager issued a decision denying the Appellant further chiropractic treatments, athletic therapy treatments, and a permanent impairment award for his right shoulder symptoms on the grounds that the Appellant's right shoulder condition was not causally related to the motor vehicle accident. The case manager further stated "There is no new information that would change or alter this opinion". She further stated:

> "You have not been identified as developing a physical impairment in function as a result of the above noted motor vehicle accident that would have a negative impact on your day-to-day activities or work capabilities."

Application for Review:

The Appellant made an Application for Review of the case manager's decision of June 20, 2005 on or about August 20, 2008 (approximately three years after the case manager's decision).

In his Application for Review of the June 20, 2005 decision, the Appellant attached the document setting out the reasons why he was late in filing his application. He stated:

> "I was confused because I thought I lost the appeal in Feb. 2005 when I was classified as a sales person and I thought I still owed MPI for the overpayment. I also thought that the overpayment of $7300 would be deducted from any permanent impairment award so why bother requesting a Review for my permanent impairment. I should have applied for a review of the decision letter dated June 20, 2005 before the 60 days expired (Aug. 20/05) however in my mind I had lost the appeal and it was hopeless. Several people at MPI advised me to wait on the outcome of my appeal to finalize my overpayment and permanent impairment issues. Why was I told to wait on the outcome of that appeal if it had no bearing on the outcome of my appeal to finalize my overpayment and permanent impairment issues. Why was I told to wait on the outcome of that appeal if it had no bearing on my permanent impairment?
>
> I have a [text deleted] Education [text deleted] and I have been struggling financially ever since the accident on August 21, 1998. I still don't understand how MPI calculated my IRI because I was self-employed fixing and selling [text deleted]. With my level of Education I am limited in skills and training however fortunate for me I enjoy fixing things that are broken."

Internal Review Officer's Decision – April 3, 2009 – Untimely Application for Review:

On April 3, 2009 the Internal Review Officer issued a decision indicating the Appellant failed to file the Application for Review within the time described by the legislation. In this respect the Internal Review Officer set out Sections 172(1) and 172(2) of the MPIC Act as noted earlier in this decision. The Internal Review Officer stated:

> "Under the circumstances I conclude that you have not established that you have a reasonable excuse for failing to apply for a review of the decision within that time. I note that you had seen fit to file two previous Internal Review Applications which were dealt with by the Commission by way of a Consent Order dated May 28, 2001 and a decision (following a hearing) on February 8, 2005. Moreover, if I were to consider your explanation then one would conclude that you would have been aware that the amount of any permanent impairment award received would reduce the amount of your overpayment.
>
> Under these circumstances therefore I have concluded that you have not established a reasonable excuse for failing to file your Application for Review within the prescribed time and it is therefore my decision that your Application for Review is out-of-time."

At the appeal hearing, the Appellant submitted that the reason for the delay in filing his Application for Review is that he was confused as he had received IRI, it was terminated and then reinstated and then reduced over a period of time. As a result he did not make a timely Application for Review of the Internal Review Officer's decision.

Internal Review Officer's Decision – April 3, 2009 – Permanent Impairment Award – Rotator Cuff:

On April 3, 2009 the Internal Review Officer issued a decision dismissing the Appellant's Application for Review of the case manager's decision of June 20, 2005 which determined:

> "1. That further treatment by an athletic therapist is not medically required.
> 2. That further chiropractic treatments beyond June 30, 2005 are not medically required.
> 3. That your right shoulder injury is not causally related to the motor vehicle accident in question and that therefore you are not entitled to a permanent impairment award for the right shoulder." (Underlining added)

The Internal Review Officer also considered the late filing of the Appellant's Application for Review:

> "By way of explanation for not filing your Application within the prescribed time, you indicated in your letter which accompanied your Application for Review the following;
>
> > "I was confused because I thought I lost he appeal in Feb. 2005 when I was classified as a sales person and I thought I still owed MPI for the overpayment. I also thought that the overpayment of $7300 would be deducted from any permanent impairment award so why bother requesting a Review for my permanent impairment. I should have applied for a review of the decision letter dated June 20, 2005 before the 60 days expired (Aug. 20/05) however in my mind I had lost the appeal and it was hopeless. Several people at MPI advised me to wait on the outcome of my appeal to finalize my overpayment and permanent impairment issues. Why was I told to wait on the outcome of that appeal if it had no bearing on my permanent impairment?"

The Internal Review Officer concluded that the Appellant had not provided a reasonable excuse for failing to apply for a review of the case manager's decision within the time permitted by the MPIC Act.

The Internal Review Officer, however, dealt with the Appellant's Application for Review on the merits and concluded that he had not established there was a causal relationship between his right shoulder complaints and the motor vehicle accident. In arriving at this decision the Internal Review Officer relied on the report of [MPIC's doctor] dated March 10, 2005. The Appellant also sought a review of the case manager's decision rejecting his permanent impairment award claim.

In his report, [MPIC's doctor] concluded that there was no causal relationship between the Appellant`s complaints in respect of rotator cuff symptoms and the motor vehicle accident. As a result the Internal Review Officer confirmed the case manager`s decision of June 20, 2005 and dismissed the Appellant's Application for Review.

Internal Review Decision – September 28, 2009 – Permanent Impairment Award – Right Shoulder – Chiropractic and Athletic Therapy Treatments – Untimely Application:

The Internal Review Officer issued a decision on September 28, 2009 wherein the Appellant was seeking a review of the case manager`s June 20, 2005 decision on issues in respect of a permanent impairment award relating to his right shoulder, athletic therapy and chiropractic treatment and timely application for review of the case manager's decision. The Internal Review Officer indicated that he was not prepared to expand his decision of April 3, 2009 to include the additional issues for which the Appellant had not requested a review. As well, the Internal Review Officer rejected the Appellant`s Application for Review as it had not been filed in a timely fashion.

There were two Notices of Appeal filed against the Internal Review Decision of April 3, 2009.

Notice of Appeal – April 3, 2009 -- Permanent Impairment Award – Right Shoulder – Chiropractic and Athletic Therapy Treatments:

The Appellant filed a Notice of Appeal dated May 23, 2009 in respect of the Internal Review Officer's Decision of April 3, 2009.

The relevant provisions of the MPIC Act are:

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

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.

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;

In the Notice of Appeal the Appellant indicated he disagreed with the Internal Review Officer's decision denying further athletic therapist treatments and chiropractic treatments beyond June 30, 2005 on the grounds they were not medically required. The Appellant disagreed with the Internal Review Officer's decision that his right shoulder injury was not causally related to the motor vehicle accident and therefore he was entitled to a permanent impairment award in respect of his right shoulder.

Notice of Appeal – November 10, 2009 - Extension of Time:

On November 10, 2009 the Appellant filed a Notice of Appeal in respect of the Internal Review Officer's April 3, 2009 decision rejecting his Application for Review for extension of time to file the application within 60 days within receipt of the case manager's decision. The Appellant asserted he had a reasonable excuse for missing the time limit.

The relevant provisions of the MPIC Act are:

Application for review of claim by corporation

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

Corporation may extend time

172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

On June 3, 2010 the Claimant Adviser wrote to [Appellant's orthopaedic surgeon #2], a surgeon at the [text deleted], requesting his opinion on the issue of causation of the Appellant's right rotator cuff tendonitis and the motor vehicle accident. In his reply of June 25, 2010 [Appellant's orthopaedic surgeon #2] stated:

> "...There is no objective way to determine whether this shoulder injury and rotator cuff injury specifically occurred at a specific point in time. We didn't have objective evidence pre-injury to compare with...
>
> It is impossible to say whether the anatomic findings in his shoulder would have been caused by a traumatic event vs. overuse. Both could be responsible...
>
> In my opinion the impairments listed by the impairment assessment therapist can be causally related to the MVA based on the history as described above…
>
> Again in the end this comes down to historical findings and quite simply, this gentleman states that he had no problem prior to the accident and had difficulties after. He definitely has an anatomic basis for his problem and again, I don't think anyone can give you objective findings to say that it occurred on the basis of his injury or some pre-existing activity." (Underlining added)

Appeal Hearing – June 15, 2011:

On June 15, 2011, the appeal hearing commenced and the Commission heard submissions from MPIC's legal counsel and the Claimant Adviser as to whether the Appellant's appeal should be dismissed on the grounds the Appellant had made an untimely Application for Review of the case manager's decision. After hearing submissions, the Commission indicated that it would

defer a decision on this issue until it heard the evidence and submissions by the parties in respect of the merits of the appeal.

The Appellant commenced his testimony and during the course of the hearing, the existence of a Consent Order between the Appellant and MPIC dated May 28, 2001 was brought to the attention of the Commission. A discussion took place between the parties as to the status of the Consent Order in respect of the jurisdiction of the Commission to continue with the appeal hearing. The Commission requested MPIC's counsel to review this matter and to advise the Commission within a few weeks as to their position in respect of the Consent Order. MPIC's counsel agreed and the proceedings were adjourned. The Commission advised the parties that upon review of MPIC's position and any response from the Claimant Adviser Office, the status of the proceedings would be determined by the Commission.

In response, MPIC's legal counsel wrote to the Commission on June 27, 2011 and stated:

> "...on our review, it is apparent to us that the Consent Order was entered into to reinstate IRI benefits on the basis of psychological reasons. This is evident form a review of [independent psychologist #1's] reports at tab 43 (April 30, 2001) and also his earlier report at Tab 45 (January 22, 2001). It is also consistent with [text deleted's] memo of April 26, 2001 (Tab 126).
>
> The Consent Order may not have been as carefully drafted as desirable, but that was the intent, in our view.
>
> It has never been MPIC's position that [the Appellant's] rotator cuff symptoms relate to the motor vehicle accident. [MPIC's doctor] has consistently opined against this assertion, as has [Appellant's physiatrist #2]." (Underlining added)

MPIC's legal counsel submitted that in light of [Appellant's orthopaedic surgeon #2's] June 25, 2010 report, a further assessment should be done to see what impairment still exists and the hearing could continue with submission on the merits of the appeal.

In response the Commission wrote to both parties on July 6, 2011 and the Commission indicated that prior to receiving any further medical reports, the status of the May 28, 2001 Consent Order must be determined and requested a submission from the Claimant Adviser Office in this respect.

MPIC's legal counsel responded to the Commission on July 15, 2011 and stated that:

1. A further review of the file indicated that MPIC's case manager had completed a two-year determination on November 8, 2002 and it was determined that the Appellant was capable of being employed as a Technical Sales Specialist Level 3.
2. The Appellant filed a Notice of Appeal and the Commission subsequently issued a decision that the Appellant should have been determined as a Level 3 Sales Clerk rather than a Technical Sales Specialist.
3. The Appellant did not receive any further IRI benefits as the determined income from the Sales Clerk position exceeded the Gross Yearly Employment Income ("GYEI") of the Appellant.
4. The Consent Order of May 2001 was no longer valid or existing as it was superseded by a decision of MPIC in respect of the Appellant's determined employment.

On August 22, 2011 the Claimant Adviser wrote to the Commission and stated:

> "We would agree with [MPIC's legal counsel] that, from the background materials in the appeal file, psychological reasons are at least in part the basis on which the claimant received benefits after the issuance of the consent judgement.
>
> We would suggest, however, that there is sufficient documentation in those background materials to support the conclusion that reinstatement of benefits was not based exclusively on psychological reasons. We would suggest that a finding of causation between the shoulder symptoms and the MVA is an essential and integral part of the consent judgement."

The Claimant Adviser made a further submission on August 23, 2011 and stated that:

1. The decision to confirm the determined employment did not override, supersede or otherwise negate the holding in the Consent Order that the Appellant's shoulder symptoms were causally related to the accident.
2. The Commission's Consent Order of May 28, 2001 and the Commission's Decision of February 8, 2005 were both valid and in no way contradicted each other.

In response, MPIC's legal counsel wrote to the Commission on August 29, 2011 and stated:

1. The Consent Order was subject to being amended by a subsequent decision based on new information pursuant to Section 171 of the MPIC Act.
2. MPIC was not precluded from advancing its position that the Appellant's shoulder symptoms did not entitle him to a permanent impairment award or further chiropractic treatments.

On October 13, 2011 the Commission wrote to the Claimant Adviser and MPIC's legal counsel and stated:

> "The Appellant has appealed the decision of the Internal Review Officer rejecting his claim that there was no causal relationship between the Appellant's right rotator cuff problems and the injuries he sustained in the motor vehicle accident in 1998. During the course of the appeal hearing, a Consent Order dated May 28, 2001 reinstating the Appellant's IRI and physiotherapy treatments was brought to the Commission's attention. In the Commission's view this Consent Order was based on [independent psychologist #1 s] opinion that the motor vehicle accident resulted in the Appellant suffering from chronic pain to the right shoulder and neck. In order to deal with this matter, the Commission decided to obtain a new report from [independent psychologist #1] and requested input from both [Claimant Adviser Officer] and [MPIC's legal counsel] on the contents of the request to [independent psychologist #1]." (Underlining added)

The Commission further indicated that in preparation of the letter to [independent psychologist #1] it was seeking input from both parties.

On October 26, 2011 the Commission wrote to the Claimant Adviser and MPIC's legal counsel and advised that [independent psychologist #1] was not available to complete an assessment of the Appellant. The Commission therefore arranged for [independent psychologist #2], a clinical psychologist to assess the Appellant and provide a report. A copy of the Commission's letter to [independent psychologist #2] was enclosed in the letter to the parties.

On October 26, 2011 the Commission wrote to [independent psychologist #2] and indicated:

> "...During the course of the hearing before the Commission on September 3, 2011 the Commission raised the following issues:
>
> 1. Whether the Appellant had a chronic pain condition at the time of the termination of IRI benefits in June 2005, which would entitle him to benefits, most notably permanent impairment benefits.
> 2. If there was a chronic pain condition, whether this impaired or prevented the Appellant in whole or in part from working as of June 2005.
>
> The Commission would request that you meet with the Appellant and assess him for the purpose of providing us with a report on or before January 9, 2012 in respect of the following questions:
>
> 1. Did he have a chronic pain condition as of June 2005?
> 2. If so, would this have entitled him to a permanent impairment award, or any other benefit?
> 3. Did he have chronic pain which impaired or prevented him from working as of June 2005?
> 4. Do you think he currently still has a chronic pain condition?"

On March 2, 2012 [independent psychologist #2] provided his report to the Commission and a copy was provided to the Claimant Adviser and to counsel for MPIC.

[Independent psychologist #2]'s report was extensive in nature and indicated that he conducted clinical reviews on November 2 and December 2, 2011; and January 11, 2012. As well he conducted a collateral interview with a physician on December 2, 2011 and conducted

psychometric assessments on November 2 and 9 and December 12, 2011. [Independent psychologist #2] stated:

> "The psychologist who he (the Appellant) saw, [independent psychologist #1], initially diagnosed a Pain Disorder associated with both psychological factors and a general medical condition that was, at the time of the assessment, January 2001, chronic, and that subsequently, as per his report, November 7, 2004, that he had symptoms of sleep disturbance, irritability, tearfulness, and passive suicidal ideation that would be characteristic of a chronic Adjustment Disorder related to his pain. The psychologist indicated in his initial report from January 22, 2001, that the pain disorder developed as a result of the MVA of August 1998." (Underlining added)

[Independent psychologist #2] noted that despite the Appellant's ongoing pain he continued to be employed in the [text deleted] industry. He further stated:

> "From my own assessment, [the Appellant] presented in a genuine, but intermittently psychologically distressed manner where he continued to have the experience of chronic pain affecting his right shoulder and neck and top of right arm, he continued working in (sic) he stated in a modified capacity, and this was associated with depressive mood and clear psychological adjustment issues given the experience he has had over the course of time with his pain, sleep maintenance problems, reduction in pleasure and enjoyment in life, irritability low tolerance, and ease of tearfulness as I did assess...
>
> In my view, the most clear psychological diagnosis at this time is of a chronic Adjustment Disorder with depressed mood, primarily, this is related to his chronic pain condition, and while [independent psychologist #1] had earlier spoken to a Pain Disorder with psychological factors and a general medical condition and, his physician has spoken to a Chronic Pain Syndrome, my opinion is that his chronic pain is exacerbated by his Adjustment Disorder as well as sleep disturbance and anxiety over his situation and, his feelings about his relationship with MPI. Hence, there are psychological factors that influence his experience of pain, and this would qualify for having a Pain Disorder with a general medical condition and psychological factors." (Underlining added)

In response to the questions put by the Commission, [independent psychologist #2] stated:

1. "Given the reports from [independent psychologist #1] as of January 22, 2001 and November 7, 2004, the treatment [the Appellant] had for his chronic pain, the reports from his physician, my consultation with his physician, and this current assessment, notwithstanding his work, on balance, he has had a chronic pain condition over the course of time that predates June 2005 and post-dates this through to current. I have only seen him contemporaneously and I have used the information from the physician when I spoke to him to provide continuity from 2005 through to current.

2. My impression is that if his underlying condition is adjudicated to be accident related, he has a permanent psychological injury in the domains of a Pain Disorder and a chronic Adjustment Disorder, and in my view, these would be ratable conditions.

3. The chronic pain and the Adjustment Disorder have not disabled him from working as of June 2005 or currently but, have led to him to need to have an accommodation, as had been recognized by MPI when he was provided with a determined occupation.

4. [The Appellant] has a chronic Adjustment Disorder and a chronic Pain Disorder given what I have reviewed and, had heard from his attending physician, with a general medical condition and psychological factors.

Case Conference – June 12, 2012:

A Case Conference was held on June 12, 2012 in the presence of representatives from the Claimant Adviser Office and MPIC's legal counsel. MPIC's legal counsel indicated that he was unaware that the Commission was considering the Appellant's claim for an adjustment disorder entitling him to benefits. MPIC's legal counsel raised the issue of the jurisdiction of the Commission to hear and determine the Appellant's claim for an adjustment disorder.

In response the Commission indicated that if MPIC's legal counsel insisted that the Commission had no jurisdiction to hear the Appellant's claim in this respect, the Commission would recommend the following procedure:

1. The Appellant could make a new application to MPIC in respect of an award for a permanent impairment on the grounds of a chronic pain disorder.
2. If the claim was rejected by the case manager, the Appellant would then be entitled to appeal directly to the Commission, without a decision from the Internal Review Officer.
3. The issues that the Commission will be required to determine are:
    a) Was there was a causal relationship between the Appellant's complaints and his rotator cuff injury and the motor vehicle accident.
    b) Was there was a causal connection between the Appellant's chronic pain disorder as diagnosed by [independent psychologist #2] and the motor vehicle accident.
    c) Whether or not, based on the occupational therapist's assessment, the Appellant was capable of returning to work.

d) Whether the Appellant had a reasonable explanation for late filing of the Application for Review.
e) Whether or not the Appellant was entitled to further chiropractic treatments or athletic therapy treatments.

The parties agreed to proceeding with the matter in this fashion.

MPIC's legal counsel wrote to the Commission on June 13, 2012 and stated:

> "Further to the Case conference of June 12, 2012, this will confirm my understanding of what we discussed:
>
> 1. MPI will refer back to the case manager the question largely discussed in [independent psychologist #2]'s report, namely chronic pain. The case manager will determine whether the chronic pain is related to the motor vehicle accident, and if so, what benefits, if any the claimant may be entitled to, such as IRI, permanent impairment, treatment etc.
> 2. The case manager will consider the arrangement of a functional Capacity Evaluation (FCE), as recommended by [independent psychologist #2]. The Claimant Adviser Office will agree to the choice of any Occupational Therapist performing the FCE.
> 3. Within 2 months, (August 15, 2010), there should be a FCE, and a review done by MPI on whether the chronic pain issue is related to the motor vehicle accident.
> 4. Following this, AICAC will be contacted and advised of MPI's position. A further Case Conference may then be necessary, possibly by telephone, to discuss the next steps."

On August 20, 2012 the Commission received a copy of an interdepartmental memorandum from [MPIC's psychologist], psychological consultant for MPIC's Health Care Services dated August 17, 2012. In this memorandum [MPIC's psychologist] indicated that the reason for the referral from MPIC was as follows:

> "The file was referred for an opinion regarding whether the claimant developed a psychological condition (pain disorder) as a result of the motor vehicle accident in question and, if so, whether this precluded him from working as a Sales/Repairman on a full or part-time basis. An opinion is also sought regarding applicable permanent impairment entitlements for psychological conditions and recommended psychological treatments."

[MPIC's psychologist] reviewed [independent psychologist #2's] report of March 2, 2012. [MPIC's psychologist] accepts [independent psychologist #2's] conclusions in respect of the diagnosis of the Appellant's Chronic Pain Disorder with both psychological factors and a general medical condition; and an adjustment disorder with depressed mood. [MPIC's psychologist] also noted that [independent psychologist #2] concluded on the basis of the review of the medical documentation that the Appellant's pain disorder likely predates June 2005 and postdates through to the current. The Commission notes that on June 30, 2005 the case manager determined that the Appellant was not entitled to a permanent impairment award.

[MPIC's psychologist] also stated:

> "It is important to note for the purposes of the present review question that a Pain Disorder associated with both psychological factors and a general medical condition requires, by definition, that the individual have an associated general medical condition or anatomical site of pain which is causing the experience of pain. In the claimant's case, the anatomical site of pain appears to be his shoulder. In order for the claimant's Pain Disorder to be causally related to the motor vehicle accident in question it would need to be established, on the balance of probabilities, that the claimant's shoulder (the anatomical site of pain) was injured as a result of the motor vehicle accident in question. This is a point which was also made by [independent psychologist #2] in his report on page 24, Point 2, where he writes:
>
> > "*My impression is that <u>if his underlying condition is adjudicated to be accident related</u> (underlining added) he has a permanent psychological injury in the domains of a Pain Disorder and a chronic Adjustment Disorder, and in my view, these would be ratable conditions.*"
>
> If the associated general medical condition (in this case shoulder pain) is not related to the motor vehicle accident in question, then the claimant's psychological conditions (Pain Disorder and Adjustment Disorder) are also not causally related to the motor vehicle accident in question.
>
> <u>The remainder of the referral questions are only relevant if it is established that the claimant's shoulder injury is related to the motor vehicle accident in question.</u>"

[MPIC's psychologist] further stated that if the causal connection is established then the Appellant's entitlement to a permanent impairment award would be 20%, under Category 11 of MPIC's Regulation.

Case Conference – September 12, 2012:

On September 12, 2012 a Case Conference was held and attended by representatives from the Claimant Adviser Office and MPIC's legal counsel.

As a result of discussion that took place at the Case Conference the Commission wrote to the parties on September 14, 2012 and indicated that the Commission would hear the issues under appeal relating to the appellant's rotator cuff injury and the late filing of the appeal. The Commission further requested that MPIC's legal counsel provide a decision from the case manager and the Internal Review Officer on the issue of the Appellant's chronic pain by September 25, 2012.

MPIC's legal counsel wrote to the Commission on September 18, 2012 and indicated that it was MPIC's position that it was premature for the Commission to render a decision on permanent impairment for chronic pain relating to the Appellant's shoulder injury since there had not been a determination between the shoulder injury and the motor vehicle accident.

On September 27, 2012 the Commission wrote to the parties indicating that a hearing was held on September 24, 2012 in respect of the following:

1. Whether the Appellant had a reasonable excuse for the late filing of his Application for Review.
2. If so, whether the Appellant was entitled to a permanent impairment award for his shoulder.

3. Whether the Appellant is entitled to further chiropractic treatments or athletic therapy treatments.

In respect of this matter, [MPIC's legal counsel] indicated that he would provide the Commission with the case manager's decision in writing by October 9, 2012. Upon receipt of the case manager's decision the Commission would then contact the parties and set a date for the hearing of this matter.

MPIC's legal counsel wrote to [independent psychologist #1] on September 28, 2012 and referred to [independent psychologist #1's] letter of January 22, 2001 wherein he provided an assessment of the Appellant to MPIC. MPIC's legal counsel indicated that:

1. [Independent psychologist #1] had reviewed the Appellant's presenting history, test results, diagnosis and recommendations and stated that in the course of the assessment [independent psychologist #1] stated that "it would appear that this pain disorder developed as a result of the MVA of August 21, 1998".
2. It would appear that [independent psychologist #1] was not provided with any prior medical reports and that it appeared that [independent psychologist #1] had assumed that the causation of the Appellant's shoulder condition was not at issue.
3. The letter further stated that prior to being seen by [independent psychologist #1], [Appellant's physiatrist #2] and [MPIC's doctor] had provided medical reports to MPIC and had both concluded, on a balance of probabilities, there was no causal relationship between the motor vehicle accident and the right shoulder rotator cuff condition.
4. [Independent psychologist #2] saw the Appellant in late 2011 and a report was completed on March 2, 2012.
5. [independent psychologist #2] stated "if his underlying condition is adjudicated to be accident related, he has a permanent psychological injury...".

6. He had requested that [independent psychologist #1] comment on five questions and enclosed the reports of [MPIC's doctor], [Appellant's physiatrist #2] and [independent psychologist #2].

In response, [independent psychologist #1] wrote to MPIC's legal counsel on October 2, 2012 and stated:

1. Having reviewed the Appellant's file, he was not provided with any medical documents in January 2001 to review.
2. In order to do a forensic review, medical documents would be required and he had no such documents. He further stated that the only information he had was the Appellant's description of the events regarding the motor vehicle accident and some appeal letters the Appellant had written regarding his claim. Based on the Appellant's presentation, he provided a diagnosis of Pain Disorder Associated with both Psychological Factors and a General Medical Condition, Chronic.
3. In his assessment report, he indicated that "*it would appear that this pain disorder developed as a result of the MVA of August 21, 1998*." He indicated that the case manager had read his report and approved treatment commencing on February 5, 2001. He further stated that the case manager had not questioned his diagnosis or his comment about causation, therefore he assumed that causation was not an issue.
4. "Based on my review of these two reports, my opinion regarding the causal relationship between [the Appellant's] Chronic Pain Disorder would have been different.

   [MPIC's doctor] indicates in his report that "*it is my opinion that based on a reasonable degree of medical probability, the premise that the motor vehicle collision and the right shoulder condition are causally related, cannot be established."* [Appellant's physiatrist #2] indicates in his report that "*with a reasonable degree of medical certainty, there is an improbable causal relationship between the patient's rotator cuff tendinopathy and the motor vehicle collision of August 20, 1998."*

> Also, [independent psychologist #2] indicates in his recent report that "*if his underlying condition is adjudicated to be accident related, he has a permanent psychological injury in the domains of a Pain Disorder and chronic Adjustment Disorder, and in my view, these would be ratable conditions."* It is noted that in his report, [independent psychologist #2] did review [Appellant's physiatrist #2]'s report.
>
> Given the opinions provided by [MPIC's doctor] and [Appellant's physiatrist #2], I would conclude that [the Appellant's] underlying physical condition (General Medical Condition) is not causally related to the MVA in question. Therefore, although he did appear to have a Chronic Pain Disorder when I assessed him in 2001, I would not have assumed that this disorder was causally related to the MVA in question if I had read [MPIC's doctor's] and [Appellant's physiatrist #2's] reports. As noted by them, this relationship is not medically probable given their respective reviews of the claimant's medical information."

Case Manager's Decision – October 2, 2012 - Permanent Impairment Entitlement, Chronic Pain:

Based on reports of [MPIC's psychologist], [MPIC's doctor], [Appellant's physiatrist #2] and [independent psychologist #2], the case manager issued a decision on October 2, 2012 and stated:

> "Your request for a permanent impairment entitlement regarding the psychological conditions in relation to your right shoulder was reviewed in consultation with our Health Care Services Team on August 17, 2012. Your entire file was reviewed along with [independent psychologist #2's] report dated March 2, 2012.
>
> The consultant opined that the anatomical site of pain is the right shoulder. In order for the diagnosis of Pain Disorder to be causally related to the motor vehicle accident in question it would need to be established, on the balance of probabilities, that the right shoulder was injured as a result of the motor vehicle accident in question. As the causation of the right shoulder has not been established as accident related, the psychological conditions (Pain Disorder and Adjustment Disorder) are not causally related to the motor vehicle accident in question.
>
> Decision:
>
> In view of the above, there is no permanent impairment entitlement for psychological conditions of pain disorder and adjustment disorder associated with your right shoulder."

Appeal Hearing:

The hearing continued on September 24, 2012, November 22 and 23, 2012. The Appellant

testified at some length that as a result of the motor vehicle accident he suffered injuries to his neck and right shoulder which caused a chronic pain disorder that negatively affected his career and quality of life. He testified that he ran a franchise operation related to [text deleted] but was unable to continue this career and was reduced to running his own business repairing [text deleted] with a substantial reduction in income. He also testified that he was a very active person and participated in many physical activities but because of the constant pain to his neck and shoulder he was unable to do so. He also testified that he was depressed because of the impact of the motor vehicle accident on his life and he had difficulty sleeping.

The Appellant further testified that the pain to his neck and shoulder were a result of the motor vehicle accident has continued unabated until the present time when he testified before the Commission.

Testimony of [independent psychologist #1]:

[Independent psychologist #1] was subpoenaed by the Commission to testify in respect of his letter to MPIC's legal counsel dated October 2, 2012. In this letter [independent psychologist #1] concluded that the Appellant's underlying physical condition (general medical condition) was not causally related to the motor vehicle accident.

In response to questions from the Commission, [independent psychologist #1] testified that a soft tissue whiplash injury caused by a motor vehicle accident over a period of time could result in a chronic pain syndrome to the injured person's neck and shoulder.

[Independent psychologist #1] testified that in June 2001 he did not receive any medical documents from MPIC in preparation of his report of January 22, 2001 to MPIC and that he only

had the description provided by the Appellant on the motor vehicle accident events and some appeal letters the Appellant had written regarding his claim with MPIC.

The Commission referred to [independent psychologist #1's] letters to MPIC of January 22, 2001 and April 30, 2001 which contradicted his testimony in respect of the documentation he had received. In his letter of January 22, 2001, [independent psychologist #1] stated:

> "The history of this accident and subsequent treatments (he has been to physiotherapy, chiropractors and a several doctors including orthopaedic surgeons and a physiatrist) will not be reviewed here as they are well documented in his file. There appears to be some disagreement among the various doctors as to the source of [the Appellant's] pain as well as whether or not his MVA actually caused the difficulties he is experiencing."

In his letter to MPIC on April 30, 2001, [independent psychologist #1] stated:

> "I should first indicate that I have not reviewed all the medical reports in this file as I was not sent them. The only extensive report I have was written by [MPIC's Internal Review Officer] dated October 24, 2000. This report as well as some letters written by [the Appellant], were provided to me by [the Appellant]. As such, my response to your letter is based on my assessment and a review of [MPIC's Internal Review Officer's] report in order to accommodate your urgent time lines."

The Commission referred [independent psychologist #1] to [MPIC's Internal Review Officer's] extensive report (14 pages) of October 24, 2000 which contradicted [independent psychologist #1's] testimony that he had not received medical documents from MPIC. [Independent psychologist #1] acknowledged that prior to writing his letter to MPIC dated January 22, 2001, he had reviewed [MPIC's Internal Review Officer's] report which contained summaries of all of

the relevant medical opinions of [Appellant's orthopaedic surgeon #1], [Appellant's doctor #1], [Appellant's physiatrist #1], as well as the reports of [Appellant's physiatrist #2] and [MPIC's doctor] on the issue of causation.

In his report to [MPIC's legal counsel], [independent psychologist #1] indicated that he did not do a forensic review because he did not have the medical documents to conduct such a review.

The Commission referred to [independent psychologist #1's] report of January 22, 2001 which contradicted his statement to [MPIC's legal counsel] in respect of a forensic review. In his report of January 22, 2001 to MPIC, [independent psychologist #1] indicated under the heading of "Test Results" that he had conducted certain tests as follows:

- BDI – the Appellant scored in the subclinical range for depression
- BAI – the Appellant had some mild anxiety symptoms
- WHYMPI – the Appellant's pain had a significant impact on his ability to work which caused financial problems

[Independent psychologist #1] stated in his report of January 22, 2001 that:

> "Based on [the Appellant's] history and current presentation, the following diagnosis is suggested:
>
> Axis 1 Pain Disorder Associated With Both Psychological Factors and a General Medical Condition, Chronic
> Axis II Nil
> Axis III Chronic Shoulder and Neck Pain
> Axis IV Occupational and Economic Problems
> Axis V Current GAF= 65

In his testimony, [independent psychologist #1] stated that:

1. He assumed that causation was not an issue and did not provide an opinion to MPIC on whether the diagnosis of the pain disorder/chronic shoulder and neck pain were causally

connected to the motor vehicle accident.

2. At the request of MPIC he provided a psychological assessment in order to determine the Appellant's current medical status and the possibility for psychological intervention.

The Commission referred [independent psychologist #1] to his report of January 22, 2001 to MPIC which contradicted this testimony in respect of his knowledge on whether there was a causal connection between chronic pain syndrome and the motor vehicle accident. In this report [independent psychologist #1] stated:

> "There appears to be some disagreement among the various doctors as to the source of [the Appellant's] pain as well as whether or not his MVA actually caused the difficulties he is experiencing."

The Commission also referred [independent psychologist #1] to [MPIC's Internal Review Officer's] extensive report of October 24, 2000 which indicated that:

1. There were conflicting medical reports from [Appellant's physiatrist #1] and [Appellant's doctor #1] on one hand and [Appellant's physiatrist #2] and [MPIC's doctor] on the other hand on the issue of causation.
2. [MPIC's Internal Review Officer] concluded that there was no causal relationship between the motor vehicle accident and the Appellant's rotator cuff tendinopathy and as a result rejected the Appellant's claim for IRI benefits.

The Commission further referred [independent psychologist #1] to [MPIC's Internal Review Officer's] report of October 24, 2000 wherein [MPIC's Internal Review Officer] stated that having regard to [Appellant's physiatrist #2]'s report, [MPIC's Internal Review Officer's] suggested that an inquiry be conducted by MPIC to determine to what extent the Appellant's possible depression and/or chronic pain syndrome were causally related to the motor vehicle

accident. The Commission suggested to [independent psychologist #1] that as a result of [MPIC's Internal Review Officer's] comments, the case manager did request [independent psychologist #1's] opinion on the issue of causation and that [independent psychologist #1] did provide an opinion on that issue.

In response, [independent psychologist #1] testified that in his letter of January 22, 2001, he did not provide an opinion to MPIC that there was a causal relationship between the pain disorder and the motor vehicle accident, but he had assumed that this matter was not an issue when he provided his report. The Commission referred [independent psychologist #1] to his letter to MPIC dated January 22, 2001 which contradicted his testimony. In this letter, [independent psychologist #1] reported conducting certain tests and diagnosed the Appellant as having a pain disorder and a chronic shoulder and neck pain and stated:

> "It would appear this pain disorder developed as a result of the MVA of August 21, 1998. Given this diagnosis, it is likely that [the Appellant] would benefit from some psychological intervention..." (Underlining added)

[Independent psychologist #1] further stated in this report that his treatment would focus on improving the Appellant's pain management skills and he was prepared to undertake this treatment.

The Commission pointed out that in response to [independent psychologist #1's] letter of January 22, 2001 MPIC's legal counsel wrote to [independent psychologist #1] on April 26, 2001 and stated that after reviewing his letter:

> "...The diagnosis evident is that [the Appellant] suffers from a pain disorder which developed as a consequence of a motor vehicle accident occurring August 21st, 1998."

The Commission suggested to [independent psychologist #1] that as a result of his opinion that there was a causal relationship between the motor vehicle accident and the Appellant's chronic pain, MPIC's legal counsel requested that [independent psychologist #1] assess the Appellant to advise whether or not the chronic pain affected the Appellant's ability to work.

The Commission also referred [independent psychologist #1] to his letter of April 30, 2001 to MPIC wherein he indicated that the chronic pain did impair the Appellant's ability to work and he recommended IRI benefits.

In his letter to [MPIC's legal counsel] of October 2, 2012, [independent psychologist #1] stated that had he seen the report of [Appellant's physiatrist #2] and [MPIC's doctor] prior to making his assessment on January 22, 2001, his opinion in respect of the causal relationship between the motor vehicle accident and the Appellant's chronic pain disorder would have been different.

The Commission suggested to [independent psychologist #1]:

1. That an examination of the reports from [Appellant's physiatrist #2] and [MPIC's doctor] did not deal with the issue of causation in respect of chronic pain, but only in respect of the rotator cuff tendinopathy.
2. Both doctors concluded that the Appellant's right shoulder problems (rotator cuff tendinopathy) were not causally related to the motor vehicle accident.

The Commission referred [independent psychologist #1] to his letter to [MPIC's legal counsel] wherein he stated:

> "[MPIC's doctor] indicates in his report that "it is my opinion that based on a reasonable degree of medical probability, the premise that the motor vehicle collision and the right shoulder condition are causally related, cannot be established. [Appellant's physiatrist #2]

> indicates in his report that "with a reasonable degree of medical certainty, there is an improbable causal relationship between the patient's rotator cuff tendinopathy and the motor vehicle collision of August 20, 1998."

The Commission also referred [independent psychologist #1] to [MPIC's Internal Review Officer's] report which [independent psychologist #1] had acknowledged reviewing prior to reporting to MPIC. The Commission indicated to [independent psychologist #1] that [MPIC's doctor] and [Appellant's physiatrist #2] were only referring to the causal connection between the Appellant's rotator cuff tendinopathy and the motor vehicle accident and not to a causal relationship between chronic pain and the motor vehicle accident.

In response to the Commission's questions, [independent psychologist #1] was unable to explain on what basis the reports of [Appellant's physiatrist #2] and [MPIC's doctor] would have caused him to change his opinion on the issue of the causal relationship between the Appellant's chronic pain and the motor vehicle accident.

In response to further questions by the Commission [independent psychologist #1] acknowledged that if he did not consider the reports of [Appellant's physiatrist #2] and [MPIC's doctor] he would conclude that there was a probable causal relationship between the Appellant's chronic pain disorder and the motor vehicle accident.

At the conclusion of the cross-examination of [independent psychologist #1], the Commission asked whether the Appellant's legal counsel had any questions for [independent psychologist #1] and he indicated that he did not. The Commission also asked MPIC's legal counsel whether he had any questions for [independent psychologist #1] and he initially indicated he did. The Commission then asked MPIC's legal counsel to indicate the nature of these questions and he

indicated that he would not proceed to ask any questions of [independent psychologist #1].

The Commission adjourned the proceedings to the following day (November 23, 2012) for the purpose of hearing submissions by both parties. Prior to the submissions being made the Commission again asked MPIC's legal counsel whether he wanted to ask [independent psychologist #1] any questions and if so the Commission would adjourn the proceedings and request that [independent psychologist #1] attend. MPIC's legal counsel indicated that he did not want to examine [independent psychologist #1].

The Commission heard submissions from both parties in respect of the issues in dispute.

Untimely Application for Review:

MPIC submitted the Appellant had significantly exceeded the time limit allowed in applying for a review of the case manager's decision. In response, the Claimant Adviser argued that the Appellant was confused with the procedure and as a result failed to make a timely Application for Review of the case manager's decision.

The Commission finds that the procedure by which the Appellant's claim was processed was rather unusual and clearly confusing to the Appellant. Pursuant to the motor vehicle accident the Appellant was initially in receipt of IRI and subsequently the IRI was terminated once he was capable of returning to work. However, due to [Appellant's physiatrist #2's] report, [independent psychologist #1] was requested to assess the Appellant and he advised MPIC that the Appellant had a chronic pain syndrome as a result of the motor vehicle accident injuries.

MPIC therefore decided to reinstate the Appellant's IRI and a Consent Order was filed with the Commission. Subsequently, MPIC determined that the Appellant was capable of returning to work and did not address the chronic pain syndrome as determined by [independent psychologist #1] and which had resulted in the Consent Order reinstating the Appellant's IRI.

The Appellant appealed that decision and the Commission determined that the Appellant was properly classified as a salesperson which resulted in a reduced IRI payment. The effect of the determined employment order was that one year from the date of the determination of the Appellant's employment by MPIC, the Appellant's IRI was terminated.

The Commission finds that the Appellant was in a great deal of pain subsequent to the motor vehicle accident, which has continued for many years without relief. The medical evidence clearly indicates that the Appellant is not only suffering from chronic pain, but he is also suffering from depression which has an impact of the Appellant's ability to motivate himself. As well, the Appellant was struggling financially subsequent to the motor vehicle accident.

Decision:

The provisions of the MPIC relating to the extension of time, for failing to apply for a review of the case manager's decision is set out Sections 172(2) and 184(1)(b) of the MPIC Act.

> **Corporation may extend time**
>
> 172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.
>
> **Powers of commission on appeal**
>
> 184(1) After conducting a hearing, the commission may

(b) make any decision that the corporation could have made.

Having regard to the complicated process by which the Appellant was required to deal with his claims arising out of the motor vehicle accident, the Appellant's medical condition, his [text deleted] education, his financial struggles, pain, depression and lack of legal representation, the Commission finds the Appellant was probably confused in failing to make a timely Application for Review of the June 20, 2005 case manager's decision. For these reasons the Commission finds that the Appellant has established on a balance of probabilities that he had a reasonable excuse for failing to apply for a review of the case manager's decision within the time allowed as set out in Section 172(1). The Commission therefore extends the time for the Appellant's Application for Review and finds that the Commission has jurisdiction to hear this appeal.

Rotator Cuff Injury:

MPIC's legal counsel reviewed the evidence and submitted that having regard to the reports of [Appellant's physiatrist #2] and [MPIC's doctor], the Internal Review Officer was correct in concluding that there was no causal relationship between the motor vehicle accident and the rotator cuff tendinopathy.

The Claimant Adviser reviewed the testimony of the Appellant, the medical reports of [Appellant's orthopaedic surgeon #2] and [Appellant's orthopaedic surgeon #1] and submitted that there was ample medical evidence to support the Appellant's testimony that the motor vehicle accident did cause the rotator cuff tendinopathy and as a result the Appellant was entitled to a permanent impairment award.

Discussion:

The Appellant's submission on the issue of causation in respect of the rotator cuff injury is based on the reports of [Appellant's orthopaedic surgeon #1] and [Appellant's orthopaedic surgeon #2]. The Commission finds that neither [Appellant's orthopaedic surgeon #1] nor [Appellant's orthopaedic surgeon #2] provided objective information to demonstrate that the Appellant's rotator cuff problems, on the balance of probabilities, were caused by the motor vehicle accident.

[Appellant's orthopaedic surgeon #1] provided a report to the Internal Review Officer dated April 4, 2000 wherein he indicated that:

1. There was no objective evidence to show that a rotator cuff injury occurred at the time of the motor vehicle accident.
2. The Appellant did not make any immediate complaint of shoulder joint symptoms which ought to have been reported by the Appellant had he suffered a rotator cuff injury as a result of the motor vehicle accident.
3. "this is not uncommon for shoulder pain relating to rotator cuff strain which does occur at the time of a motor vehicle accident to develop days to a couple of weeks following the accident".

The Commission notes that the motor vehicle accident occurred on August 21, 1998. Both [MPIC's doctor], in his report of July 21, 1999, and [Appellant's physiatrist #2], in his report of March 7, 1999, state that the first report by the Appellant of a rotator cuff tendinopathy was provided by [Appellant's physiotherapist #2] in his initial physiotherapy report of March 9, 1999, which was approximately 6½ months after the motor vehicle accident. As a result [Appellant's orthopaedic surgeon #2] was unable to state that the Appellant's complaint of right rotator cuff tendinopathy was causally related to the motor vehicle accident since the Appellant

had not complained of this injury until several months had elapsed.

The Commission therefore finds that [Appellant's orthopaedic surgeon #1]'s medical opinion on causation corroborates the opinions of [MPIC's doctor] and [Appellant's physiatrist #2] that there was no causal relationship between the Appellant's right rotator cuff problems and the motor vehicle accident.

[Appellant's orthopaedic surgeon #2] concluded his report by stating:

> "As mentioned earlier it is impossible to prove the items you are seeking to prove. In the end it is simply an opinion based on the patient's history and from my point of view I think his historical count is fully plausible, however not objectively defendable.
>
> Again in the end this comes down to historical findings and quite simply, this gentleman states that he had no problem prior to the accident and had difficulties after. He definitely has an anatomic basis for his problem and again, I don't think anyone can give you objective findings to say that it occurred on the basis of his injury or some pre-existing activity."

[MPIC's doctor's] report to MPIC dated July 21, 1999 stated that the Appellant's first documented problems of right shoulder were identified in a report by [Appellant's physiotherapist #2] on March 7, 1999. [MPIC's doctor] stated:

1. Prior to the date of this report there is no documentation of trauma occurring to [the Appellant's] right shoulder.
2. It was not probable that a shoulder injury would go undetected for approximately six months considering the assessments the Appellant had undergone over that period of time.
3. There was insufficient medical information to establish a cause and effect relationship between the right shoulder complaints and the motor vehicle accident.

[MPIC's doctor], in his interdepartmental memorandum to the case manager on April 2, 2000, commented on [Appellant's orthopaedic surgeon #1's] opinion that a possible explanation of how the Appellant's right shoulder condition might have been missed and in turn progressed to the condition identified by the MRI. [MPIC's doctor] stated that this explanation appears to be based on the information that the Appellant's right shoulder became apparent over two or three weeks following the motor vehicle accident. [MPIC's doctor] stated:

> "The clinical notes do not identify a prominent right shoulder pain during this period of time. There is documentation of neck pain in association with a burning sensation in the right shoulder as well as stiffness in both shoulders. Cervical pain can often produce referred symptoms to the shoulder regions. The first documentation of shoulder pain in the absence of neck pain is noted on November 2, 1998. Subsequent to this, there is no documentation of ongoing right shoulder pain that would be in keeping with a shoulder joint abnormality such as a rotator cuff tendinopathy or acromioclavicular joint abnormality." (Underlining added)

[MPIC's doctor] further indicated:

1. Overuse is the most common cause of rotator cuff tendinitis and repetitive activities over shoulder height could develop irritation and inflammation around the rotator cuff tendon which in turn can lead to subacromial bursitis.

2. "After reviewing the new documents submitted to [the Appellant's] file, it is my opinion that based on a reasonable degree of medical probability, the premise that the motor vehicle collision and the right shoulder condition are causally related, cannot be established." (Underlining added)

[Appellant's physiatrist #2] provided a report to the Internal Review Officer on September 8, 2000. [Appellant's physiatrist #2] disagreed with [Appellant's orthopaedic surgeon #2's] opinion of the rotator cuff pathology following the motor vehicle accident. [Appellant's physiatrist #2] stated that there are no literature citations documenting rotator cuff pathology following motor vehicle collisions. [Appellant's physiatrist #2] was of the view that a rear-end collision could not cause a rotator cuff pathology.

> "In a rear-end collision, such contact is not possible. In a driver restrained by a lap and shoulder belt, the shoulder is unlikely to contact the interior of the vehicle. It is improbable that such a mechanism would result in rotator cuff impingement. Therefore, the mechanism of injury as proposed is an improbable cause of rotator cuff tendinopathy."

[Appellant's physiatrist #2] agrees with [MPIC's doctor] that it was improbable that there was a causal relationship between the Appellant's rotator cuff tendinopathy and the motor vehicle accident.

The Commission finds that the Internal Review Officer's decision of October 24, 2000 was correct in adopting [Appellant's physiatrist #2's] report of September 8, 2000 in which he stated:

> "He appears to base his opinion on:
> 1. There is no medical literature suggestive of a cause/effect relationship between rear-end collisions and rotator cuff pathology
> 2. That the clinical presentation following the accident was not consistent with rotator cuff tendinopathy
> 3. That the symptoms up to 6 months post-collision appear to be of a cervical nature
> 4. The temporal relationship of events documented is not supportive of the existence of cause-effect relationship"

[MPIC's doctor] and [Appellant's physiatrist #2] clearly assert that there was no causal relationship between the Appellant's right rotator cuff problems and the motor vehicle accident. Both doctors agreed that if the Appellant had suffered right rotator cuff problems as a result of the motor vehicle accident, the Appellant would have complained about this injury immediately after or within several weeks of the motor vehicle accident, which he did not. The medical evidence, which was not challenged by the Appellant, indicated that the first documented report of the Appellant's rotator cuff problems was 6½ months after the motor vehicle accident. The Commission finds that [Appellant's orthopaedic surgeon #1] and [Appellant's orthopaedic surgeon #2] agree with the opinion of [Appellant's physiatrist #2] and [MPIC's doctor] on the issue of causation.

Decision:

For these reasons the Commission finds that the Appellant has failed to establish on a balance of probabilities that there was a causal connection between the rotator cuff tendinopathy and the motor vehicle accident. As a result, the Commission dismisses the Appellant's appeal relating to further athletic therapy treatments and further chiropractic treatments in relation to the rotator cuff tendinopathy and confirms the Internal Review Officer's decision of October 24, 2000 and April 3, 2009.

SUBMISSION:

Chronic Pain:

The Appellant testified that the motor vehicle accident injuries caused him to have immediate pain to his neck and back and that pain continued without any permanent relief. The chronic neck and shoulder pain adversely affected the Appellant's quality of life and his career. Prior to the motor vehicle accident he was physically fit and participated in a number of physical activities. He was the manager of a franchise operation [text deleted] but was unable to physically continue that position. Unfortunately, due to his financial circumstances he was unable to quit working and continued to work at a reduced pace by operating a [text deleted] business.

MPIC took the position that the Appellant's chronic pain did not prevent him from returning to work. Based on the reports of [MPIC's doctor] the case manager determined that the Appellant did not, on the balance of probabilities, establish that he was entitled to a permanent impairment award and to chiropractic and athletic therapy treatments as there was no causal connection between the Appellant's chronic pain and the motor vehicle accident.

The essential position of MPIC's legal counsel was that the anatomical site of pain was the right shoulder. In her decision of October 2, 2012 the case manager stated:

> "The consultant opined that the anatomical site of pain is the right shoulder. In order for the diagnosis of Pain Disorder to be causally related to the motor vehicle accident in question it would need to be established, on the balance of probabilities, that the right shoulder was injured as a result of the motor vehicle accident in question. As the causation of the right shoulder has not been established as accident related, the psychological conditions (Pain Disorder and Adjustment Disorder) are not causally related to the motor vehicle accident in question."

MPIC's legal counsel agreed with [MPIC's doctor]'s opinion that there was no objective evidence to support the Appellant's position that he suffered a chronic pain disorder as a result of the motor vehicle accident. MPIC's legal counsel therefore submitted that the Appellant's appeal be dismissed and the case manager's decision be affirmed.

Discussion:

The Commission rejects MPIC's submission that there was no causal relationship between the motor vehicle accident and the Appellant's neck and shoulder pain/pain disorder. The Commission finds that on the balance of probabilities the Appellant has established that there was such a relationship.

In a decision on [text deleted] (AC-03-195), the Commission stated:

> "The Commission has in the past recognized that as a result of chronic pain an Appellant could be entitled to receive IRI benefits. For example in the case of [text deleted] *(AC-03-66)* the Commission, in its decision dated August 11, 2004, stated:
>
> The Commission in the decision [text deleted] *(AC-03-07)* stated at page 9:
>
> Despite the Appellant's ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:

> Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:
>
> > In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.
>
> In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

The Commission was referred to the case of *Nova Scotia (Worker's Compensation Board) v. Martin et al [2003]* S.C.J. No. 54, Mr. Justice Gonthier stated:

> 1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. . ."

The Commission finds that MPIC failed to consider the Appellant's ongoing complaints of pain and had given little weight to the Appellant's subjective concerns. MPIC erred in concluding

that unless there was objective evidence to the anatomical site of the pain in the Appellant's right shoulder, he was unable to establish a causal relationship between his chronic pain and the motor vehicle accident.

The Commission finds that the Appellant was a credible witness who testified in a straightforward, unequivocal fashion in respect of the impact caused by the injuries he sustained in the motor vehicle accident. The Appellant testified that:

1. As a result of the motor vehicle accident he immediately felt sharp pain to his neck and back.
2. He was taken to the [hospital #1] Emergency Room where he complained of neck and back pain.
3. Three days later he attended the office of his personal physician, [Appellant's doctor #1], and reported increased pain and stiffness to his neck, pain in the lower back and occasional headaches.
4. A few days later he attended for treatment with the physiotherapist, [Appellant's physiotherapist #1], and complained of neck and back pain, and headaches.
5. The pain to his neck and back has continued unabated from the date of the motor vehicle accident.

Evidence of Appellant's Consistent Pain:

A review of the medical evidence clearly establishes that the Appellant has consistently complained of chronic pain to his neck and back since the motor vehicle accident.

1. [Appellant's doctor #1] saw the Appellant three days after the motor vehicle accident and provided a report to MPIC dated September 8, 1998 where he diagnosed "whiplash injury mechanism cx muscle neck strain". (Underlining added)

[Appellant's doctor #1] reported:

"I am at a loss to explain why he has had so much discomfort. His reflexes are equal bilaterally and there is no evidence of neurological damage (his brachial radialis, biceps and triceps and reflexes were all 2+ bilaterally on December 7, 1998)." (Underlining added)

2. [Appellant's doctor #1] also reported to MPIC that he saw the Appellant on September 2, 1998, October 15, 1998, November 2, 1998, December 7, 1998 and the Appellant regularly complained of ongoing neck discomfort. [Appellant's doctor #1] referred the Appellant to [Appellant's physiatrist #1], a physiatrist, for an assessment.
3. The Appellant saw [Appellant's chiropractor], a chiropractor, in respect of complaints of "burning pain in lower neck and upper back, front neck muscle pain, left mid back pain, right arm weakness with wrist pain".
4. [Appellant's chiropractor] provided a report to MPIC indicating he treated the Appellant between January 9, 1999 and January 30, 2004 for a total of 131 treatments.
5. [Independent physiotherapist], a physiotherapist, on behalf of MPIC conducted a third party musculoskeletal examination. He reported that the Appellant was complaining about a burning sensation radiating from the right neck to shoulder girdle. The Appellant noted that this sensation was constant with variable intensity.
6. The Appellant was referred to [Appellant's physiatrist #1], a physiatrist who reported the Appellant's complaints of burning neck pain, sleep disturbances and reduced functional capabilities.
7. [Appellant's doctor #1] reported MPIC on March 9, 1999 of his concerns in respect of the Appellant's depression and stated that he could not work because of the neck pain.
8. In a report to the case manager on March 29, 1999, [Appellant's doctor #1] stated:

"...I am at a loss to describe his on-going pain and discomfort. He is certainly not able to do any "heavy work" which seems to be lifting anything greater than 10 pounds..." (Underlining added)

9. On July 9, 1999 [Appellant's physiatrist #1] provided a report to [Appellant's doctor #1] indicating that he saw the Appellant on June 28, 1999 and diagnosed that the Appellant had regional myofascial neck pain syndrome. (Underlining added)

   [Appellant's physiatrist #1] further stated:

   "Clinically I am not convinced that he has any rotator cuff or biciptal tendon tear." (Underlining added)

10. On July 21, 1999 [MPIC's doctor] provided a report to MPIC indicating that the Appellant had a number of conditions, including cervical, thoracic and lumbar strain and symptoms of depression.
11. An examination of [Appellant's doctor #1's] chart notes indicated the Appellant had no complaints of neck pain prior to the motor vehicle accident. The chart notes for the period August 24, 1998 to April 8, 1999 indicated that the Appellant had consistently complained of neck pain on numerous occasions.
12. In October and November of 1999, [Appellant's doctor #1] wrote to the case manager reporting the Appellant's complaints of neck pain.
13. [independent psychologist #1] diagnosed the Appellant with a chronic pain disorder in January of 2001.
14. [Independent psychologist #2] in his report, 14 years later, confirmed the findings of [independent psychologist #1] that the Appellant was suffering from a chronic pain disorder.

Consent Order – May 28, 2001:

Central to the dispute between the parties was the meaning of the Consent Order issued by the Commission on May 28, 2001. The Appellant's submission was that the Consent Order related

to the rotator cuff injury and also to the chronic pain syndrome. MPIC's position was that the Consent Order had no relationship to the rotator cuff injury and related only to the chronic pain disorder. In order to determine this issue, the Commission considered the history of the events which resulted in the Consent Order.

[Appellant's physiatrist #2] provided a report to MPIC on September 8, 2000 wherein he diagnosed: :

1. "Right rotator cuff tendinopathy
2. Whiplash-Associated Disorder Type II (resolved)
3. Possible depression
4. Possible chronic pain disorder with delayed recovery" (Underlining added)

In his report to MPIC, [Appellant's physiatrist #2] indicated that six months after the motor vehicle accident the Appellant's clinical signs and symptoms were probably related to a cervical origin, secondary to the shoulder girdle. [Appellant's physiatrist #2] recommended that the Appellant be referred to a clinical psychologist for diagnosis.

The Appellant applied for a review of the case manager's decision which rejected his application for IRI and physiotherapy treatments on the grounds that there was no causal relationship between his rotator cuff tendinopathy and the motor vehicle accident.

The Internal Review Officer, [MPIC's Internal Review Officer], reviewed the evidence and dismissed the Application for Review on the grounds that there was no causal relationship between the Appellant's rotator cuff tendinopathy and the motor vehicle accident. In regard to [Appellant's physiatrist #2's] comments, [MPIC's Internal Review Officer] directed that MPIC conduct an investigation to determine if there was a causal relationship between the Appellant's possible depression and/or chronic pain syndrome and the motor vehicle accident.

The Commission finds that as a result of [MPIC's Internal Review Officer's] direction, the case manager did refer the Appellant for an assessment by [independent psychologist #1]. In his letter of January 20, 2001 to MPIC, [independent psychologist #1] stated that after obtaining the Appellant's history he conducted the following tests:

- BDI – the Appellant scored in the subclinical range for depression
- BAI – the Appellant had some mild anxiety symptoms
- WHYMPI – the Appellant's pain had a significant impact on his ability to work which caused financial problems

As a result of these tests [independent psychologist #1] made a diagnosis of chronic pain in the Appellant's shoulder and neck. The Commission further finds that [independent psychologist #1] did state that in his view, the Appellant's chronic pain disorder had developed as a result of the motor vehicle accident and recommended that the Appellant be treated for this condition and that he receive IRI benefits.

The Commission finds that MPIC's legal counsel, upon reviewing [independent psychologist #1's] letter, concluded that [independent psychologist #1] did find there was a chronic disorder caused by the motor vehicle accident. The Commission further notes that in [independent psychologist #2's] medical report dated March 2, 2012 (approximately 14 years after the motor vehicle accident), he stated that on review of [independent psychologist #1]' January 20, 2001 letter, [independent psychologist #1] had found that there was a causal relationship between the motor vehicle accident and the chronic pain disorder.

The Commission finds that, based on [independent psychologist #1's] opinion on the causal relationship between the motor vehicle accident and the Appellant's chronic pain disorder, that MPIC entered into an agreement with the Appellant to have [MPIC's Internal Review Officer's] Internal Review Decision of October 24, 2000 rescinded and that the Appellant's IRI benefits be reinstated and any physiotherapy expenses incurred by the Appellant be reimbursed by MPIC.

Pursuant to this agreement a Consent Order was issued by the Commission on May 28, 2001 reinstating the IRI benefits and reimbursing the Appellant for any physiotherapy treatments. The Commission finds that MPIC, having accepted [independent psychologist #1's] opinion that the Appellant's chronic pain disorder was causally related to the motor vehicle accident, agreed to rescind the Internal Review Officer's decision of October 24, 2000 which had terminated the Appellant's benefits on the grounds there was no causal relationship between the Appellant's rotator cuff tendinopathy and the motor vehicle accident. In these circumstances, it would be surprising for MPIC to consent to a Commission Order which reflected in part that there was a causal relationship between the Appellant's rotator cuff tendinopathy and the motor vehicle accident.

For these reasons, the Commission rejects the Appellant's submission that the Consent Order related, in part, to a recognition by MPIC that there was a causal relationship between the Appellant's rotator cuff tendinopathy and the motor vehicle accident. The Commission finds that the Commission's Consent Order related only to an acceptance by MPIC that there was a causal relationship between the motor vehicle accident and the Appellant's chronic pain disorder.

Further Submissions:

After the submissions were concluded on November 23, 2012, [text deleted], counsel for the Appellant wrote to the Commission on November 26, 2012 and submitted that the Consent Order included acknowledgement by MPIC that there was a causal relationship between the motor vehicle accident and both the chronic pain syndrome and the rotator cuff injury. He therefore submitted that MPIC was prevented from raising the issue of causation of the rotator cuff tendinopathy because there was no new evidence pursuant to Section 171(1) of the MPIC Act to challenge the Consent Order.

In reply on November 29, 2012 MPIC's legal counsel objected to the Appellant making any further submission to the Commission after the hearing was concluded on November 23, 2012. MPIC's legal counsel further stated:

> "Further to your letter of November 28, 2012, I will re-state that the issue of the relationship of the MVA to rotator cuff tendinopathy was completed in September 2012. No further argument was to be allowed. None was allowed on November 23, 2012 and none should be allowed by written submission.
>
> Moreover, as we have argued *ad-nauseum* previously, the Consent Order did not deal with the physical injury. MPI cannot be estopped from challenging the causation of the rotator cuff to the MVA."

The Commission agrees with MPIC's legal counsel's submission that the Consent Order only relates to the issue of chronic pain syndrome and does not relate to the issue of the right rotator cuff tendinopathy. Since the Commission has determined that the Consent Order only relates to the chronic pain syndrome, the Commission rejects the submission by the Appellant's legal counsel that MPIC is prevented from arguing that there is no causal relationship between the motor vehicle accident and the chronic pain syndrome. The Commission finds that notwithstanding the existence of the Consent Order, MPIC was entitled to argue that the evidence did not establish that there was a relationship between the motor vehicle accident and

the chronic pain syndrome. For the reasons outlined herein the Commission rejected MPIC's submission in this respect.

After reviewing the Appellant's testimony, which was corroborated by the medical reports of [Appellant's doctor #1] and [Appellant's physiatrist #1], and the history of the Appellant's consistent complaints of chronic pain, the Commission finds that the Appellant has established on a balance of probabilities that there was a causal relationship between the Appellant's chronic neck and shoulder pain/pain disorder and the motor vehicle accident. The Commission therefore rescinds the decision of the Internal Review Officer dated October 24, 2000 and finds that Appellant is entitled to a permanent impairment award in respect of his chronic neck and shoulder pain/pain disorder. The Commission refers this matter back to MPIC's case manager to determine a permanent impairment award.

Dated at Winnipeg this 21st day of January, 2013.

MEL MYERS

MARY LYNN BROOKS

GUY JOUBERT